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IN THE

Supreme Court of the United States

STATE OF CONNECTICUT, *ex rel.* RICHARD BLUMENTHAL, ATTORNEY GENERAL; TOWN OF LEDYARD, TOWN OF NORTH STONINGTON, TOWN OF PRESTON,

Petitioners,

v.

THE UNITED STATES DEPARTMENT OF THE INTERIOR; BRUCE BABBITT, SECRETARY OF THE INTERIOR; KEVIN GOVER ASSISTANT SECRETARY OF THE INTERIOR FOR INDIAN AFFAIRS; FRANKLIN KEEL, EASTERN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Second Circuit misconstrued the Connecticut Indian Land Claims Settlement Act, 25 U.S.C. §§ 1751-1760, by construing the statutory limits of the Secretary of the Interior's trust acquisition authority so broadly that, as conceded by the court, it "would theoretically make it possible for the Secretary to take into trust virtually all of southeastern Connecticut," thereby diminishing the sovereign territory of the State without its consent.

2. Whether the Second Circuit's application of the Indian canon of statutory construction to a contemporary act of Congress that is not the result of unequal bargaining power of Indians is inconsistent with the original intent of the canon as articulated through this Court's precedents.

3. Whether the Second Circuit erred in deferring to an agency interpretation of the Connecticut Indian Land Claims Settlement Act, 25 U.S.C. §§ 1751-1760, when the interpretation permitting the trust acquisition in question is inconsistent with and a complete reversal of the agency's prior interpretation made two years earlier disallowing the same trust acquisition.

LIST OF PARTIES

The caption contains all of the parties to this Petition. Petitioners here were plaintiffs in the district court and appellees in the court of appeals. Respondents here were defendants in the district court and appellants in the court of appeals.

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PETITION FOR WRIT OF CERTIORARI

Petitioners State of Connecticut, ex rel. Richard Blumenthal, Attorney General; Towns of Ledyard, North Stonington, and Preston, Connecticut respectfully petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, decided on September 25, 2000, is reported at 228 F.3d 82 (2d Cir. 2000), and is reprinted in Appendix A to this Petition. The December 15, 1998, memorandum decision on cross motions for summary judgment of the United States District Court for Connecticut (J. Chatigny) is reported at 26 F. Supp. 2d 397 (D. Conn. 1998), and is reprinted in Appendix B to this Petition.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Second Circuit was decided on September 25, 2000. This Court has jurisdiction to review the opinion and judgment of the court of appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statutory provisions involved in this case are contained in the Connecticut Indian Land Claims Settlement Act ("Settlement Act" or "Act"), 25 U.S.C. §§ 1751-1760. The Settlement Act is reprinted in Appendix C to this Petition.

STATEMENT OF THE CASE

In 1995, the Attorney General of Connecticut and the Towns of Ledyard, North Stonington and Preston ("Towns") challenged in federal court in Connecticut the decision of the

Secretary of the Interior to take into trust for the Mashantucket Pequot Tribe ("Tribe") off-reservation land located in the Towns. The complaints raised myriad issues about the legality of the trust acquisition process and decision. At issue was the ability of the federal government to remove land from state and local government jurisdiction for an Indian tribe's extraordinarily successful casino resort under a law intended only to assist tribes to achieve economic self-sufficiency.

The district court limited its decision to the controlling issue of the Secretary's authority under the Settlement Act, finding that section 1754(b)(8) of the Act precluded the trust acquisition and supplanted the Secretary's general authority under section 5 of the Indian Reorganization Act of 1934 ("IRA"). The Secretary appealed, and the Court of Appeals for the Second Circuit reversed the district court. In doing so, the court of appeals relied upon a principle of statutory construction developed by this Court during the nineteenth century to give the benefit of doubt to Indian tribes disadvantaged by unequal bargaining power in negotiating with the United States. The court of appeals invoked the doctrine to favor a tribe that had the benefit of sophisticated legal representation to achieve its goals through contemporary federal legislation.

The court of appeals also granted deference to the Secretary's interpretation of the Settlement Act, even though that interpretation emerged only after the Tribe's lobbying efforts produced a complete reversal of previously controlling legal analysis. Taken together, these two incorrect applications of Supreme Court precedent caused the court of appeals to reach an incorrect interpretation of the Settlement Act.

A. Statement of Facts

The Indian Commerce Clause of the Constitution (U.S. Const. art. I, § 8, cl. 3) grants Congress plenary authority to establish the policies of the United States dealing with

Indians. *South Dakota v Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). Historically, the linchpin of Congress's Indian policies has been the negotiation and Senate ratification of treaties, and the enactment of statutes defining the rights of the tribe and the responsibilities of the United States. During the eighteenth and nineteenth centuries, Congress did not recognize any Indian groups that resided in the New England states nor authorize title to land to be taken into trust for their benefit.

The factual underpinnings of this case are rooted in the first federal recognition of a tribe located in New England with the 1980 passage of the Maine Indian Claims Settlement Act. 25 U.S.C. § 1721 *et seq.* In the 1970's, the Pasamaquoddy Indians became the focus of a legal campaign coordinated by the Native American Rights Fund ("NARF"), a national legal advocacy group, to achieve tribal recognition and recover historic Indian lands. On behalf of the Pasamaquoddy, NARF filed suit in 1972 to establish that the Nonintercourse provisions of the Trade and Intercourse Act, now codified at 25 U.S.C. § 177, applied to these Indians even though no tribe had been recognized under the laws of the United States. The courts agreed with that interpretation. *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649 (D. Me.), *affd.* 528 F.2d 370 (1st Cir. 1975). The success of the suit led to the negotiation and the passage by Congress of the Maine Indian Claims Settlement Act in 1980.

NARF embarked upon a campaign to locate other unrecognized tribes in the eastern United States in order to file other claims for Nonintercourse Act violations and force enactment of land claims settlement legislation. This campaign led to a suit in Connecticut on behalf of the Pequot Tribe, alleging land transfers in violation of the Nonintercourse Act. *See* Complaint filed in *Western Pequot Tribe of Indians v Holdridge Enterprises, Inc.*, No. H-76-193 (D.

Conn. 1976).[1] As with the Maine Indian land claims, NARF negotiated a settlement of the Pequot claims and asked Congress to implement the settlement through legislation.[2]

Congress passed the Settlement Act in October 1983. In 1986, the Tribe's lawyers obtained a court ruling that a bingo hall could be operated on the Mashantucket Pequot reservation. *Mashantucket Pequot Tribe v. McGuigan*, 626 F. Supp. 245 (D. Conn. 1986). In 1987, the Tribe wished to have certain lands located outside the reservation taken into trust by the Secretary on the Tribe's behalf. Recognizing that such action was contrary to the Bureau of Indian Affairs' ("BIA")

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[1] The history of the Settlement Act is set forth in J. Benedict, *Without Reservation: The Making of America's Most Powerful Indian Tribe and Foxwoods, the World's Largest Casino* (2000). This book details how the Mashantucket Pequot Tribe was able to carry out a sophisticated legal strategy to attain recognition as a federal Indian tribe through the Settlement Act, and then parlay that status into a gaming empire generating revenues in excess of $1 billion per year through the world's largest casino.

[2] Unlike the historical imposition of treaty terms upon disadvantaged Indians, the Mashantucket Pequot representatives had mastered the complexities of modern legislation. In 1982, the Connecticut congressional delegation introduced the bill in the 97th Congress as S. 2719 and H.R. 6612. 128 Cong. Rec. 13923, 15685 (1982). H.R. 6612 passed the House, 128 Cong. Rec. 27396-400 (1982), and with minor amendment, passed the Senate. *Id.* 31610-13. But the House failed to concur in the Senate amendment prior to adjournment of the 97th Congress. *Id.* 32888-90, 33259-61. At the beginning of the 98th Congress, the bill was reintroduced as S. 366 and H.R. 982. 129 Cong. Rec. 379, 1270 (1983). S. 366 quickly passed both houses, *id.* 3018-21, 6441-47, but was vetoed by President Reagan. The President questioned whether the tribe met "the standard requirements for Federal recognition or services that are required of other tribes." *Id.* 7586. Thereafter, the Tribe secured sufficient votes to override the presidential veto. This caused the Secretary of the Interior to acquiesce to the bill he had previously opposed, and the Settlement Act was passed again by both houses of Congress and signed by the President.

then-current view that the Act prevented such an acquisition, the Tribe's attorney urged in a letter of December 17, 1987, that BIA interpret the Act so that land outside the settlement lands could be taken into trust if it was not purchased with Settlement Act funds. App. B, 44a. BIA's Regional Solicitor rejected the Tribe's request and rendered a legal opinion on January 28, 1988, stating that the Tribe's "interpretation of the statute is at odds with its legislative history, and we cannot agree with it." AR IX-A-2, JA 464, 465. The Regional Solicitor stated further, relying on the terms of the Act itself, that the "contours of the Act are immediately apparent. Lands . . . within the 'settlement lands' may be taken into trust. [citing § 1754(b)(7)]. . . . Lands located outside the 'settlement lands' must be held in fee and are not subject to restrictions against alienation [citing § 1754(b)(8]." *Id.* Thus, no trust acquisitions were made after this opinion. The Tribe sought reconsideration of BIA's opinion and this time, by letter dated May 30, 1990, the Regional Solicitor acquiesced, reversing his position and endorsing the very interpretation that he had categorically rejected in 1988. App. B, 44a.

In the same year the Tribe obtained the first interpretation of the Settlement Act, Congress enacted the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701 *et seq.*, which authorized Indian tribes to engage in gaming on land the title to which is held in trust by the United States for the benefit of the tribe. The Tribe supported the legislation, and over the protest of the State, was authorized to engage in casino gaming on land held in trust by the Secretary. *Mashantucket Pequot Tribe v Connecticut*, 913 F.2d 1024 (2d Cir. 1990).

With a new interpretation of the Act, the Tribe began filing applications to take into trust land situated outside of the settlement lands identified in the Act. The first acquisition comprising twenty-seven acres was completed quickly in 1992 without the notice to the Towns required by BIA

regulations. *See* Johnson Decl. ¶ 26, JA 525, 534.[3] In January 1993, the Tribe applied to BIA to take into trust the land at issue here—247 acres located outside the settlement area. *See* Jan. 27, 1995 memo, F. Keel to Acting Deputy Commissioner for Indian Affairs, AR I-W-1, JA 320; Oct. 28, 1994 memo, B.D. Ott to A. Deer, AR VIII-AM-1, JA 40.[4]

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[3] "JA" refers to the Joint Appendix filed in the court of appeals in this case. References to "AR" are to the Administrative Record filed in the district court and transmitted to the court of appeals as part of the record below.

[4] BIA's construction of the Settlement Act was one among a number of expedient reversals of position taken by the agency to benefit the Tribe in the course of review of this trust acquisition. Issues on which BIA reversed its position included the intended use of the land, whether there was a gaming purpose to the acquisition and the scope of state jurisdiction. Each of these instances is supported by the factual record before the district court and was briefed by the parties below. During the course of discovery, the Towns and the State uncovered documents and elicited testimony that demonstrated that a portion of the proposed trust land (eighty-two acres) was initially purchased with Settlement Act funds. App. B, 25a; December 9, 1993 facsimile, D. Schweid to B. Wakole, AR I-Q-6, JA 307, 312; Nov. 9, 1995 Wakole Dep. at 8-11, JA 494-96. Under the Secretary's interpretation of the Act, this fact disqualified the land for trust status. Ultimately, BIA concurred that the 82 acres could not lawfully be taken into trust and the Tribe was forced to withdraw its application with respect to the parcel in question, leaving approximately 165 acres in this trust acquisition. App. B, 25a. Discovery also revealed that some BIA officials knew of the source of funds used to purchase the land and its obvious consequence. JA 494, 496-98. Successive drafts of the Area Director's recommendation memorandum and the final decision document explicitly denied this critical fact, and there was testimony that suggested the concealment was intentional. *See* Nov. 9, 1995 Wakole Dep. at 10-11, JA 494, 496; May 1, 1995 memo, Director, Office of Trust Responsibilities, to A. Deer, AR I-AD-2, JA 331, 332; Mar. 7, 1996 Ott Dep. Exs. 11, 13, JA 591, 593, 601, 602; Oct. 14, 1994 memo, B.D. Ott to A. Deer, AR XI-C-3; JA 472, 474. The Department of Justice made a criminal referral of this conduct. Although there was no prosecution, the Inspector General of the Department of the Interior conducted a lengthy investigation which resulted in some disciplinary action.

This parcel is located on the north side of Connecticut Route 2, across from the Tribe's Foxwoods casino and resort complex. In April 1993, the Tribe submitted another application to take an additional 1200 acres (the Lake of Isles property) in trust also located outside the settlement area and adjacent to the 247 acres. BIA rejected this application. *See* May 6, 1993 letter, B.D. Ott to R.A. Hayward, AR I-L-1, JA 305.

Upon first becoming aware of the Tribe's request to take into trust off-reservation land, the Towns assessed the potential consequences to their communities. Documents obtained by the Towns in the course of the litigation below reveal that the Tribe had several purposes for the trust requests. First, the Tribe hoped to expand its existing casino operation onto the 247 (now 165) acres through the construction of an array of resort and gaming facilities. *See* Dec. 2, 1993 letter, EPA to J. Harriman, AR VIII-X-I, JA 438; Nov. 7, 1994 letter, J. King to S. Burrington, AR VIII-BD-15, JA 461-63; Dec. 23, 1994 letter, J. Lozier to B. Babbitt, AR VIII-BD-1, JA 447, 448-50. Placing the land at issue in trust removes it from the reach of state sovereignty and the state and local controls that apply to all other land in Connecticut.[5] It would enable the Tribe to avoid zoning, land use, and environmental requirements of the local jurisdictions. Also, any development occurring on trust lands would be tax exempt.

Second, the Tribe's subsequent land purchases reveal the significance to the Tribe of the 165-acre parcel at issue here:

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[5] To the extent there exists federal land within Connecticut, such land was not taken and cannot be subjected to federal authority without the consent of the State legislature under the Enclaves Clause of the Constitution. *See* U.S. Const. art. I, § 8, cl. 17. Whether or not Indian trust lands constitute a federal enclave, it would seem anomalous that the United States could take Connecticut land out of state sovereignty without state consent for Indian use but not for national security uses such as "Forts, Magazines, Arsenals, dock-Yards and other needful Buildings."

If the 165-acre parcel is taken into trust, the 1200-acre Lake of Isles property (itself the subject of a trust acquisition request) will be viewed as contiguous and will, under the Tribe's view, be eligible for trust status under the Act as well. The Tribe's new found wealth derived from its gaming operations on trust lands permits it to purchase, and request trust status for, vast amounts of land in southeastern Connecticut,[6] thus presenting a significant threat to the State and to the ability of the Towns to continue to function as governmental entities.

B. The Settlement Act

The Act reflects congressional ratification of a settlement agreement among the State, citizens of the Towns and the Tribe resolving aboriginal land claims by the Tribe under the Nonintercourse provisions of the Trade and Intercourse Act of 1790. 25 U.S.C. § 177. The United States was not a party to the settlement or the underlying lawsuit, and had no trust relationship with the Tribe which was not federally recognized at the time.[7] The Act extended federal recognition to the Tribe, 25 U.S.C. § 1758(a), and demarcated a reservation comprising the existing 200-acre Connecticut reservation and any settlement lands taken in trust by the United States. *Id.* 25 U.S.C. § 1757(a). Settlement lands are expressly defined in the Act. *Id.* § 1752(4).

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[6] Indeed, the Second Circuit explicitly acknowledged that its construction of the statute "would theoretically make it possible for the Secretary to take into trust virtually all of southeastern Connecticut," but admonished that the parties should address this policy issue to Congress. App. A, 21a.

[7] In fact, the Department of the Interior opposed passage of the Settlement Act on the ground that it allowed the Tribe to avoid the burden of demonstrating its bona fide status as a federal tribe pursuant to federal regulations for tribal recognition under 25 C.F.R. Part 83. *See Mashantucket Pequot Land Claims Hearings on H.R. 6612 Before the Comm. on Interior and Insular Affairs*, 97th Cong. 23 (1982) (statement of William Coldiron, Solicitor, Department of the Interior).

Most important for purposes of this case, the Act addresses the Secretary's trust acquisition responsibilities for the Tribe by commanding that certain land be taken into trust and prohibiting trust status for other land. These congressional directions use geographic location to define the Secretary's authority: "Lands . . . located within the settlement lands shall be held in trust," *id.* § 1754(b)(7), and "Land . . . located outside the settlement lands shall be held in fee . . . and the United States shall have no further trust responsibility with respect to such land." *Id.* § 1754(b)(8). In its decision, the Second Circuit erroneously found that an implied limitation based on the source of funds used to purchase land took precedence over the location of the land in defining the Secretary's authority. With that decision, the Secretary's trust acquisition authority for the benefit of the Tribe is effectively not limited by the Act.

Congress also addressed in the Act the respective sovereign rights of the State and the Tribe by subjecting the reservation to State jurisdiction to the maximum extent provided by law, *id.* § 1755, and by declaring that "lands within the reservation which are held in trust . . .or which are subject to a Federal restraint against alienation at any time after October 18, 1983" shall be Indian country. *Id.* § 1757(a).

C. Decisions Below

Petitioners brought suit to obtain a declaration that the Secretary's decision to take the 247-acre parcel of land into trust was unlawful and violated the Settlement Act. *See* App. A, 1; App. B, 23a. On cross-motions for summary judgment, the district court granted petitioners' motions and permanently enjoined the trust acquisition. App. B, 47a.

The district court determined that the Settlement Act prohibited the Secretary from taking in trust land located outside of the settlement lands, regardless of the source of funds used to purchase the land. App. B, 42a, 45a-47a. The

district court concluded that its construction was the only one consistent with the terms, purpose, and overall structure of the Act and its legislative history. App. B, 33a-42a. The court held that the Act settled not only title to land, but also the territorial sovereignty and scope of jurisdiction of the Tribe:

> It is unreasonable to suppose that the parties negotiated a settlement to include these arrangements and yet intended to allow the Secretary to take into trust for the benefit of the Tribe any and all land acquired by the Tribe in the future, as long as the land was not purchased with Settlement Fund money.

App. B, 40a-41a.

In addition, the district court rejected the Secretary's assertion that the court ought to defer to the Department's interpretation of the statute at issue. The court concluded that such deference was unwarranted under the circumstances because the interpretation at issue: (a) was inconsistent with congressional intent and purpose; (b) inconsistent with prior interpretations of the Secretary on the same issue; and (c) concerned the interpretation of a provision enacted specifically to prohibit agency action. App. B, 42a-44a. The district court also declined to apply the Indian canon of construction. Without deciding whether the canon applied to this Tribe, the district court found that "even when appropriately applied, [the canon] will not defeat a construction based on a proper analysis of congressional intent." App. B, 46a (citing *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587 (1977)).

On appeal, the Second Circuit reversed the district court, holding that "taken as a whole" the Settlement Act prohibits the Secretary from taking into trust on behalf of the Tribe those lands lying outside of the settlement lands only if the land was purchased with settlement funds. App. A, 9a-12a.

The court of appeals found that the phrase "acquired under this subsection" conclusively means "purchased with Settlement funds," App. B, 12a, and that the Secretary was free under the IRA to take into trust any land not purchased with the $900,000 appropriated by Congress. The court held that the "Settlement Act was not . . . intended to settle once-and-for-all the extent of the Mashantucket Pequot's sovereignty." App. B, 13a. The court stated that, with respect to the meaning of section 1754(b)(8), "little, if any, ambiguity remains on that score." App. A, 12a. At the same time, it concluded that the legislative history "at first blush appears to support the Connecticut plaintiffs' position," but it "is no less ambiguous than the statute itself." App. A, 16a.

The court of appeals stated that the district court "refused" to apply the Indian canon or accord deference to the Secretary's interpretation, while it did both. App. A, 1a. The Second Circuit found the Indian canon applicable to the Tribe, citing *Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 758 (1985), for the proposition that the "Supreme Court has applied the canon where Indians were at no disadvantage." App. A, 18a [228 F 3d at 92]. The court also accorded deference, pursuant to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and declined to follow *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987), on the stated ground that the agency's reversal of its interpretation was now ten years old and "well-settled" by the time the issue reached the court.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The decision below markedly diminishes the sovereignty of the State without its consent through the use of tools of statutory construction to create presumptions adverse to the State and Towns. The Settlement Act limits the authority of the Secretary of the Interior to take land into trust for the

Mashantucket Pequot Tribe. The court of appeals misconstrued the limitation in the Act, in large measure, because it employed tools of statutory construction—the Indian canon and *Chevron* deference—under circumstances that clearly show that the reasons for their use are not present in this case. The Second Circuit's application of these interpretative presumptions has profound consequences to the sovereignty and jurisdiction of Appellant State and Towns, and thus raises an "important question of state power over Indian affairs" that should be settled by this Court. *See Williams v. Lee*, 358 U.S. 217, 218 (1959).

Application of the Indian canon of construction has often been confused, inconsistent, and not in accord with its original purpose. As a result, a rule developed by this Court to ensure that Indian tribes without effective representation were not disadvantaged in construing treaties they negotiated with the federal government has been transformed into a rule that favors Indian tribes regardless of the legal instrument at issue, the circumstances under which it which arose, or the realities of the contemporary legislative process through which most Indian laws are enacted.

The Second Circuit's decision is an example of the misapplication of the Indian canon to a federal law that has none of the characteristics of a treaty or statute to which the doctrine should be applied. The Settlement Act, like most modern Indian statutes, resulted from a complex and thorough Congressional process in which the Indians were ably represented and the legislation itself was vetted through committees charged with safeguarding the interests of tribes. At a time when many Indian tribes know how to negotiate the halls of Congress, defend their interests in dealings with the Executive Branch, and benefit from the best legal and political representation, it makes little sense to continue to apply in a mechanical fashion a rule of construction that is the vestige of a bygone era. A similar problem arises in the

manner in which the court of appeals gave deference to the Secretary's interpretation of the Act. No deference is due an agency that expediently reversed its position on key issues, including its interpretation of the provision of the Act at issue in this case, to support its desired result. The Second Circuit could reach this result only by misconstruing the principles of deference under the *Chevron* doctrine developed by this Court.

By improperly invoking these legal doctrines, the Second Circuit produced an incorrect interpretation of the Settlement Act. In doing so, the court of appeals has wrongfully diminished the sovereignty of the State of Connecticut and its political subdivisions. It also has further engrained in case law an incorrect application of the Indian canon that is evident in many federal court decisions and created a rule of construction that gives agencies carte blanche to change their minds on the meaning of statutory text to meet the policy goals of the moment. This Court should accept review of this case to clarify the circumstances under which both doctrines should apply.

I. The Second Circuit Misconstrued the Settlement Act to Allow the Trust Acquisition of Lands Located Outside the Settlement Lands Set Forth in the Act.

The Settlement Act is a complete blueprint of which lands may be taken into trust for the benefit of the Tribe. The Congressional direction is set forth as either a command to take land into trust or a prohibition against the Secretary's doing so. Appellants argued and the district court held that the key provision of the Act, 25 U.S.C. § 1754(b)(8), was an explicit prohibition based on the geographic location of the land in question:

> *Land* or natural resources acquired under this subsection *which are located outside of the settlement lands shall be held in fee* by the Mashantucket Pequot

> Tribe, and the United States shall have no further trust responsibility with respect to such land and natural resources.[8]

Id. § 1754(b)(8) (emphasis added).

Contrary to the plain meaning of the provision, the court of appeals held that the words "acquired under this subsection" meant "purchased with Settlement Act funds appropriated by Congress." The court of appeals held that, at least prospectively, there is no geographic limitation on the Secretary's trust authority as long as the land was not purchased with the $900,000 of the Fund, which was expended in 1984. With this interpretation, the sovereignty of the State of Connecticut and the scope and jurisdiction of the Appellant Towns may regularly be diminished subject only to the Secretary's exercise of his discretion.

It cannot reasonably be disputed that Congress intended in the Settlement Act to supplant the Secretary's authority under the IRA to some extent. The savings clause of section 1758 states that all general Indian laws "which are not inconsistent with any specific provision of this subchapter shall be applicable to the Tribe." Thus, Congress contemplated that something in the Act was intended to be inconsistent with general Indian laws, such as the IRA. Earlier in the same year that Congress passed the Settlement Act, it amended the IRA with the Indian Land Consolidation Act, 25 U.S.C. §§ 2201-2210. Although the amendment became law ten months before the Connecticut Act was passed, it followed passage of a number of other specific settlement acts. The amendment explicitly addresses the potential inconsistency between

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[8] The matching language of command appears at 25 U.S.C. § 1754(b)(7): "Lands or natural resources acquired under this subsection which are located within the settlement lands shall be held in trust by the United States for the benefit of the Tribe." Like section 1754(b)(8), there is no explicit limitation imposed by the source of funds used to purchase land.

specific settlement acts and the IRA in setting forth the Secretary's authority to take land into trust, by stating

> that nothing in this section is intended to supersede any other provision of Federal Law which authorizes, prohibits, or restricts the acquisition of land for Indians with respect to any specific tribe, reservation or state.

Id. § 2202.

In the amendment Congress clearly recognized that the Secretary's trust acquisition authority under section 5 of the IRA would not apply in those circumstances where settlement acts authorized, prohibited or restricted land acquisitions for specific Indian groups. The Settlement Act at issue is such an act. The Secretary's entire authority to take land into trust for the Mashantucket Pequot Tribe is set forth and limited in the Settlement Act. In keeping with the savings clause of the Act and Section 2202 of the Indian Land Consolidation Act, the Secretary retains no trust acquisition powers under the IRA that can be exercised for this Tribe.[9] That being the case, the words "acquired under this subsection" are not superfluous as the Second Circuit held. The phrase simply means acquired by or on behalf of the Tribe, since an acquisition of land by the Tribe is a prerequisite to describing the trust status of that land.

The district court correctly held that the Act provides that land outside the settlement lands shall not be taken into trust, pursuant to the prohibition of section 1754(b)(8), and land within the settlement lands shall be taken into trust, pursuant to section 1754(b)(7). This interpretation of the Act is the only means of reconciling the Act's various provisions.

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[9] The congressional committee reports that accompany the Settlement Act state, "The Secretary's ability to acquire land for the Tribe is limited to the authority provided by this Act." S. Rep. No. 98-222, at 14 (1983); H.R. Rep. No. 98-43, at 9 (1983).

The Second Circuit's implication of a source of funds condition from the words "acquired under this subsection" is a strained construction that is inconsistent with other provisions of the Act. When Congress intended a limitation based on the source of funds it said so explicitly. Section 1754(b)(5) provides that:

> As the Fund or any portion thereof is disbursed by the Secretary . . . *the United States shall have no further trust responsibility to the Tribe . . . with respect* to the sums paid, any subsequent expenditures of these sums, or *any other property other than private settlement lands . . . purchased with these sums.*

Id. § 1754(b)(5) (emphasis added). It is simply not plausible to suggest that Congress sought to achieve the same end in adjacent sections of a statute by using fundamentally different formulations to express the same meaning. It cannot have used the words "purchased with these sums" in section (b)(5) to mean purchased with the Settlement Act Fund, and then intended the same meaning in sections (b)(7) and (b)(8) through the use of the phrase "acquired under this subsection." If "acquired under this subsection" had the meaning the Second Circuit found, the last words of (b)(5) would be that phrase rather than "purchased with these sums."

Moreover, the Second Circuit's reading results in inconsistency and redundancy between subsections of the Act. Under the Second Circuit's construction, section 1754(b)(7) requires trust status for land within the settlement lands which was purchased with the Fund. However, section 1754(b)(5) says that the Secretary shall have no trust responsibility to *any property* other than *private settlement lands* purchased with the Fund. Since the terms "settlement lands" and "private settlement lands" are separately defined in section 1752(3), the court's construction renders sections (b)(5) and (b)(7) redundant at best and inconsistent at worst. If section 1754(b)(8) had the meaning ascribed to it by the Second

Circuit, its claimed prohibition – non-settlement lands purchased with Settlement Act funds cannot be taken into trust – is made redundant by section (b)(5)'s mandate that there will be no trust responsibility with respect to "any property other than private settlement lands . . . purchased with these sums." *See Connecticut National Bank v. Germain*, 503 U.S. 249, 253 (1992) (courts "disfavor interpretations of statutes that render language superfluous").

Section 1757, entitled "Restriction against alienation," defines, solely by geographic limits, those lands that may be taken into trust or subject to a restraint against alienation. It provides that "lands within the reservation which are held in trust by the Secretary . . . or which are subject to a Federal restraint against alienation at any time after [passage of the Act] shall be subject to the laws of the United States relating to Indian lands." 25 U.S.C. § 1757(a). Only "lands within the reservation" are contemplated to be in trust or subject to a restriction against alienation. The reservation, as defined in section 1752(7), is limited to the existing Connecticut reservation and any settlement lands taken into trust. *Id.* § 1752(7). These provisions, taken together, indicate that at no time after the date of enactment would lands other than the settlement lands (including the reservation) be subject to a restriction against alienation and thereby be subject to tribal sovereignty. Since trust lands are, by definition, inalienable, these provisions strongly suggest that the Act does not contemplate that any non-settlement lands can be taken into trust.

The legislative history of the Settlement Act directly supports the district court's conclusions and is inconsistent with the Second Circuit's construction of the Act. The Report of the Senate Select Committee on Indian Affairs and the report of the House Committee on Interior and Insular Affairs contain identical language explicating the meaning of section 1754(b)(8):

> Section [1754](b)(8) specifically provides that lands not falling within the definition of "settlement lands" are to be held in fee by the Mashantucket Pequot Tribe and are not to be taken in trust by the United States. It provides further that the United States shall have no trust responsibility with respect to those lands. Finally, the subsection provides that these lands will not be subject to any restraint against alienation imposed by the laws of the United States.

S. Rep. No. 98-222, at 14 (1983); H.R. Rep. No. 98-43, at 9 (1983). The reports contain no reference to the Settlement Act Fund or the consequences of buying land with the Fund in their discussion of sections 1754(b)(7) or (b)(8). The legislative history makes the same distinction based on geographic location of the land as does the text of the two provisions: trust status depends on whether the land is within or outside the settlement area.

Further support that Congress intended a geographic distinction for trust lands is found in the discussion of economic development plans in the portion of the report explaining section 1754(b)(7). The report admonishes that "lands that may be acquired as part of an approved economic development plan that do not satisfy the definition of settlement lands set forth in subsection [1752] are not to be taken in trust for the Tribe." S. Rep. No., 98-222, at 14 (1983); H.R. Rep. No. 98-43, at 9 (1983). By using geographic location to limit trust authority, the Committee reports again underscore the intent of Congress to prohibit trust status for land outside the settlement area. The district court correctly inferred from this language additional evidence of the intent that any land other than settlement lands is not to be taken in trust. App B, 34a-35a.

Neither the text of sections 1754(b)(7) or (b)(8) nor the portions of the Committee reports that discuss those sections make any mention of the funds used to purchase land. Only

section 1754(b)(5) seeks to limit trust status based on the funds used to buy the land, and the Committee discussion of the provision similarly makes explicit mention of the Settlement Act Fund:

> The Committee notes that nothing in section [1754(b)] is intended to limit any authority of the Secretary to accept settlement lands in trust for the benefit of the Tribe which may be purchased with funds beside those provided through the Settlement Fund.

S. Rep. No. 98-222, at 14 (1983); H.R. Rep. No. 98-43, at 9 (1983). If section (b)(8) had the meaning the Second Circuit found, this explanation would not state that the Secretary's trust authority is limited to "settlement lands." Rather, it would have explained that nothing was intended to limit the authority of the Secretary to accept any land in trust if the lands were not purhased with Settlement Act funds.

Because the Act is a legislative endorsement of a privately negotiated settlement of the land and jurisdictional disputes among the parties at the time of enactment, it is necessary to construe the Act in a manner that effectuates its purpose. In construing a statute, courts "look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990). The Second Circuit construed the Act in a manner that largely undermines its purpose in effecting a settlement and abrogates the agreed upon balance of the respective parties' sovereignty and jurisdiction.

The Congressional findings that comprise the first section of the Act state that "the parties to the lawsuit and others interested in the settlement of Indian land claims within the State of Connecticut have reached an agreement which requires implementing legislation." 25 U.S.C. § 1751(d). The Senate Report explains that "[t]he purpose of [the Act is] to provide Congressional ratification and implementation of a

settlement of claims raised by the Mashantucket Pequot Tribe." S. Rep. No. 98-222, at 5 (1983). The Second Circuit erroneously concluded that the Act accomplished nothing more than quieting title to land.

A settlement of aboriginal land claims involves a good deal more than the mere issue of title to land. Title to land as between sovereigns carries with it attendant rights of sovereignty, jurisdiction and the scope of police powers that are as much a part of the settlement as are land titles.[10] The Act provides for federal recognition of the Tribe (§ 1758(a)); it establishes territorial sovereignty for the Tribe in a reservation (§ 1752(7)); it establishes state criminal and civil jurisdiction over the reservation (§ 1755); it extends the restraint against alienation to certain lands (§ 1757(a)); and it provides for an economic development plan to be approved by the Secretary (§ 1754(b)(3)). As the district court found, "[i]t is unreasonable to suppose that the parties negotiated a settlement to include these arrangements and yet intended to allow the Secretary to take into trust for the Tribe any and all land acquired by the Tribe in the future, as long as the land was not purchased with Settlement Fund money." App B,

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[10] Settlements of aboriginal land claims typically encompass broad agreements involving land dispositions, jurisdiction and territorial sovereignty of tribes and state and local governments:

> In negotiating the Nonintercouse Act claims, the parties bargain for an arrangement with which they can live in the future. The Tribes typically negotiate for a land base and a settlement fund sufficient to promise a stable cultural and economic future. The State negotiates for an appropriate jurisdictional authority over the tribe and its land, the preservation of the property tax base, and so forth. The settlement in the end usually bears little relationship to the positions set forth in the initial complaints and answers in the [underlying] suit.

The Mashantucket Pequot Indian Claims Settlement Act, in Mashantucket Pequot Indian Land Claims: Hearing on S. 1499 before the Senate Comm. on Indian Affairs, 98th Cong. 32 (1983) (staff memorandum).

40a. Any construction of the Act that is in harmony with its purpose must give effect to such provisions. The Second Circuit's interpretation leaves forever unresolved the amount of land that may be removed from the tax base, the scope of the respective jurisdictions of the Tribe, the State and the Towns, and substantially undoes much that the parties bargained for in the settlement.[11]

II. The Second Circuit's Reliance on the Indian Canon of Statutory Construction Was an Erroneous Attempt to Resolve Ambiguities in the Settlement Act.

Contrary to the district court, the Second Circuit relied upon the "unique canon of construction governing statutory provisions involving Indians" in finding that the Settlement Act does not prohibit the trust acquisitions at issue. App. A, 17a. Despite the historical premise underlying the Indian canon – that Indians are "weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith" (*Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977) (citations omitted))—the court of appeals rejected the appellants' contention that the canon should not apply in this case, where the Tribe was ably represented by legal counsel, at the time the Act was conceived, and was then, and is now, at no practical disadvantage.

As applied by the Second Circuit, the canon might be stated as follows: If the text of a federal statute that involves Indians is ambiguous, it must be conclusively presumed that Congress intended the ambiguous text to have the meaning

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[11] Section 1755 of the Act extends state jurisdiction over the reservation to the maximum extent provided by law. If land outside the reservation can be taken into trust, it need not, as was decided by the Secretary in this case, be subject to state jurisdiction. JA 331, 336. The resulting hodge podge of inconsistent jurisdiction is clearly not the end negotiated by the parties or desired by Congress.

that advantages the Indians who are the beneficiaries of the enactment.

But the court's version of the canon is the product of an imprecise, and indeed confused, reading of a line of decisions of this Court that stretches back to *Worcester v. Georgia*, 31 U.S. 515 (1832). In recent years, some courts have mechanically invoked the canon as the Second Circuit did in this action. *See, e.g., Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444-45 (D.C. Cir. 1988) (holding that if the Oklahoma Indian Welfare Act can be construed in favor of the Indians, then the canon requires that the statute "*must* be construed in favor of the Indians")(emphasis in original). Other circuits have not. *See, e.g., Shields v. United States*, 698 F.2d 987, 990-91 (9th Cir. 1983) (holding in declining to apply the canon that "[t]he canon of construction cannot be used by the courts to accomplish what Congress did not intend").

In 1977 the United States Senate established a temporary Select Committee on Indian Affairs to facilitate the enactment of statutes that would implement the recommendations of the American Indian Policy Review Commission that Congress had established in 1975. S. Res. 4, 95th Cong. (1977) (enacted). In 1984 the Senate transformed the Select Committee into a permanent standing committee. Since 1977, Congress, on the recommendation of the Senate Committee on Indian Affairs, has enacted numerous statutes,[12] many of which resulted from negotiations, like that

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[12] By way of example, during the period 1983-1994 alone, Congress passed numerous other tribal-specific laws, including: Pokagon Band of Potawatomi Indians Act of 1994, 25 U.S.C. § 1300j *et seq.*; Little Traverse Bay Bands of Odawa Indians, Little River Band of Ottawa Indians Act of 1994, *id.* § 1300k *et seq.*; Auburn Indian Restoration Act of 1994, *id.* § 1300l *et seq.*; Paskenta Band of Nomlaki Indians of California Act of 1994, *id.* § 1300m *et seq.*; Catawba Indian Tribe of South Carolina Restoration of Federal Trust Relationship Act of 1993, *id.* § 941 *et seq.*; Washington Indian (Puyallup) Land Claims Settlement Act of 1989, *id.* §

leading to the Settlement Act, where there was no language or cultural disadvantage or disparity of bargaining power.

During the eighteenth and nineteenth centuries, Congress exercised its Indian Commerce Clause authority principally to clear the public domain of the Indians who occupied it. Between 1778 and 1871, the means Congress employed to accomplish that objective was the treaty. Commissioners would negotiate an agreement with the leaders of a tribe of Indians pursuant to which the leaders would "agree" to cede their tribe's aboriginal title to the land its members used and occupied in exchange for compensation provided by the United States. When a negotiation produced agreement, the Commissioners would write the terms for the tribe's cession of its aboriginal title into a document denoted a treaty. The treaty then would be ratified by the Senate.

As this Court noted in *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630-31 (1970), "[t]he Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent." Describing the reality of that process, in *Jones v. Meehan*, 175 U.S. 1, 11 (1899), the Court with equal candor acknowledged:

> that the negotiations for [every] treaty [were] conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy,

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1773 *et seq.*; Coquille Indian Tribe of Oregon: Restoration of Federal Supervision Act of 1989, *id.* § 715 *et seq.*; Hoopa-Yurok Settlement Act of 1988, *id.* § 1300i *et seq.*; Lac Vieux Desert Band of Lake Superior Chippewa Indians Act of 1988, *id.* § 1300h *et seq.*; Massachusetts Indian Land Claims Settlement Act of 1987, *id.* § 1771 *et seq.*; Seminole Indian Lands Claim Settlement Act of 1987, *id.* § 1772 *et seq.*; Yselta Del Sur Pueblo: Restoration of Federal Recognition Act of 1987, *id.* § 1300g *et seq.*; Texas Band of Kickapoo Indians Act of 1983, *id.* § 1300b-11 *et seq.* All of these laws were developed through comprehensive legislative processes that present none of the factors that gave rise to the Indian canon.

> masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States . . . .

Given the disparity between the negotiating positions of the U.S. commissioners and the Indian negotiators, Justice Marshall writing for the Court in *Worcester v. Georgia*, 31 U.S. 516 (1832), admonished that "[t]he language used in treaties with the Indians should never be construed to their prejudice," and to avoid doing "injustice to the understanding of the parties," how "the words of the treaty were understood by this unlettered people [Indians], rather than their critical meaning, should form the rule of construction." *Id.* at 582.

Disputes about the meaning of words and phrases in the texts of Indian treaties that were negotiated in the nineteenth century continue to the present day. When those disputes have reached this Court, the Court has employed Justice Marshall's rule of construction. *See Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970) (citations omitted, noting that the Court "has often held that treaties with the Indians must be interpreted as they would have understood them, and any doubtful expressions in them should be resolved in the Indian's favor."); *accord, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675-76 (1979); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 194 n. 5. (1999).

After the Civil War, the House of Representatives objected to the continued use of treaties, in whose ratification it could

not participate, to implement Native American policy. In 1871 the Senate agreed that no new treaties would be negotiated. 16 Stat. 544, 566 (1871). As a consequence, U.S. commissioners still were sent into Indian country to negotiate agreements with representatives of Indian tribes for the cession of the tribes' aboriginal titles. But rather than "treaties," the documents now were called "agreements." And rather than ratified by the Senate, the agreements would be approved by both Houses through the enactment of statutes.

Whether a document that reduced an agreement to writing was called a treaty or an agreement, the disparity between the negotiating positions of the U. S. commissioners and the Indian negotiators was the same. For that reason, when disputes about the meaning of words and phrases in agreements that had been negotiated with Indian tribes reached the Court, the Court continued to employ Justice Marshall's rule of construction. *See Winters v. United States*, 207 U.S. 564, 576 (1908) (holding that "[b]y a rule of interpretation of *agreements* and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians") (emphasis added); *accord, Choate v. Trapp*, 224 U.S. 667, 675 (1912); *DeCoteau v. District County Court for the Tenth Judicial District*, 420 U.S. 425, 447 (1975).

Almost a century after *Worcester v. Georgia* announced this rule of construction, the Court put it to a new use. In 1887, William Duncan, an Anglican missionary, settled with 800 Canadian Tsimshean Indians on Annette, a large island in southeast Alaska. In 1888, at Duncan's urging, Representative Byron Cutcheon introduced a bill whose enactment would withdraw Annette Island for the use of Duncan "and those native people who have recently emigrated with him from British Columbia." *See* H.R. 8193, 50th Cong. (1888). In 1891, Congress enacted section 15 of Chapter 561, 26 Stat. 1101, withdrawing "the body of lands known as Annette Islands."

In 1916 a California corporation erected a fish trap in the waters offshore Annette Island, and the United States filed suit to have it removed. In *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918), the Court determined that Congress had enacted section 15 to create a location at which the Tsimshean Indians could "become self-sustaining" and that, since the Indians were fishermen, their use of the surrounding waters for that purpose was essential to the achievement of Congress's intended objective. On that basis, the Court concluded that Congress intended the phrase "the body of lands known as Annette Islands" to include the surrounding waters, as well as the uplands of Annette and smaller adjacent islands. *Id.* at 89-90.

But in so holding the Court noted that its "conclusion has support in the general rule that *statutes* passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Id.* 89 (emphasis added). In support of that contention, the Court cited *Choate v. Trapp*, 224 U.S. 667, 675 (1912), a case that involved construing an *agreement* that had been negotiated with an Indian tribe.

Alaska Pacific Fisheries is the turning point in the evolution of the Indian canon. It marks the juncture at which the Court extended a rule that had served to protect disadvantaged Indian treaty negotiators to situations where laws involving Indians were enacted by Congress through a complex legislative process that often had little to do with agreements forged between parties with unequal bargaining strength. Creating a rule of construction to divine the intent of Indian negotiators embodied in words and phrases of agreements they did not write and which had been written in a language that few Indian negotiators understood may be warranted. Extending the rule to situations where statutes evolve from a modern sophisticated legislative process wherein the interests of Indian tribes are adequately represented is not warranted.

Relying on decisions of this Court that, upon analysis, do not support the principle of law for which they have been cited, some courts have blindly invoked the rule of construction to presume the intent of Congress. For example, in *Ramah Navajo Chapter v. Luhan*, 112 F.3d 1455 (10th Cir. 1997), the Tenth Circuit employed the rule to interpret the intent of Congress embodied in amendments to the 1988 Indian Self-Determination and Education Assistance Act. To justify doing so, the court baldly asserted that "[t]his canon of statutory construction is 'rooted in the unique trust relationship between the United States and the Indians.'" *Id.* at 1461 (citation omitted). But as authority for that proposition, the court cited *Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985), another case in which this Court interpreted the intent of the negotiators embodied in an eighteenth century *treaty*, rather than the intent of Congress embodied in a recent statute where Indian interests were ably represented.

In this case, the Second Circuit applied the Indian canon to interpret the intent of Congress embodied in the phrase "acquired under this subsection" in section 1754(b)(8) of a statute enacted in 1983. Simply put, the Second Circuit transformed a rule fashioned at the beginning of the nineteenth century to shield members of Indian tribes from being taken unfair advantage of into a sword that the court wielded to misconstrue the intent of Congress in the Settlement Act. It reached this result due to the lack of precision and clarity in the precedent that has developed over the years for applying the Indian canon.

As the Second Circuit decision demonstrates, the standards employed by the lower federal courts in applying the Indian canon of construction are unclear and confused. Clearly, the principles underlying the Indian canon should find no application to a modern statute conceived as part of a sophisticated strategy by a national advocacy organization on

behalf of Native Americans and born through a complex legislative process in which the Indian group was ably and aggressively represented. At a time when most Indian statutes are developed through comparable procedures and the historical imbalance that gave rise to the Indian canon has been eliminated, it is appropriate for this Court to revisit the canon, disentangle the case law that has arisen under it, and define a standard that better reflects the reality of contemporary Indian law. Clarification of the rule is particularly important in the era following enactment of the Indian Gaming Regulatory Act when many tribes, like the Mashantucket Pequots, have attained great wealth and benefit through the assistance of non-Indian business interests.

III. The Second Circuit Erred in Deferring to the Secretary's Most Recent Interpretation of the Settlement Act, Which Is Inconsistent with and a Complete Reversal of the Department's Prior Interpretation Disallowing the Instant Trust Acquisition.

The court of appeals' analysis of the deference owed to agency interpretations of ambiguous statutes where, as here, the interpretation is at odds with an earlier position is also flawed. Contrary to the district court, the court of appeals gave little weight to the fact that the Secretary's latest interpretation of his trust acquisition authority under the Settlement Act stands in direct contrast to the position taken on the issue only two years earlier. *See* App. A, 20a-21a.

There is no dispute that the Department did a complete reversal of its position on the issue of whether lands located outside of the settlement lands could be taken in trust by the Secretary under the Act. *See* App. A, 20a-21a. This agency reversal was one of many before the district court that, along with documented misconduct, could reasonably have caused the court to question the competence, reliability and integrity of the agency to which it was asked to defer. Inherent in the

doctrine of judicial deference to agency interpretation is the concept that the agency have some quality that warrants deference – some level of experience, expertise, consistency, and integrity in carrying out its statutory mandate. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984) (noting historical underpinnings of judicial deference to agency determinations). None of those qualities is evident on this record.

As this Court has declared, a complete turnaround by an agency in its position implicates the admonition that "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (citations omitted). It is well-established that no deference is due interpretations that are inconsistent with congressional intent and purpose. *Morton v. Ruiz*, 415 U.S. 199, 237 (1974). Moreover, the district court had no need to bow to the agency's interpretation because the "judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron, U.S.A., Inc.*, 467 U.S. at 843 n.9.

The Second Circuit's citation to this Court's opinion in *Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991), rather than excusing, actually highlights the court's error on this point. In *Rust*, the Court concluded that deference to changed agency interpretations was appropriate where the agency "amply justified [its] change of interpretation with a reasoned analysis." *Id.* at 187 (citations omitted). Here, the Department supplied no such justification grounded in "reasoned analysis." The change appears to be based on expediency alone and, as the district court concluded, does not provide a basis for the judicial deference accorded by the court of appeals below. App. B., 44a-45a. In the absence of some

basis for deference, there is nothing that makes the agency superior to an Article III jurist in the task of discerning the meaning of federal legislation.

CONCLUSION

For the reasons stated, this Court should grant the petition for writ of certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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December 22, 2000

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT.

Docket No. 99-6042.

STATE OF CONNECTICUT, ex rel. RICHARD BLUMENTHAL, ATTORNEY GENERAL; TOWN OF LEDYARD, TOWN OF NORTH STONINGTON, TOWN OF PRESTON,

Plaintiffs-Appellees,

v.

THE UNITED STATES DEPARTMENT OF THE INTERIOR; BRUCE BABBITT, SECRETARY OF THE INTERIOR; KEVIN GOVER, ASSISTANT SECRETARY OF THE INTERIOR FOR INDIAN AFFAIRS; FRANKLIN KEEL, EASTERN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS,

Defendants-Appellants.

Argued: Jan. 6, 2000
Decided: Sept. 25, 2000

Before: KEARSE, WALKER, and CALABRESI, Circuit Judges.

JOHN M. WALKER, JR. Circuit Judge:

Defendants-appellants, the United States Department of the Interior; Bruce Babbitt, Secretary of the Interior; Kevin Gover, Assistant Secretary of the Interior for Indian Affairs; and Franklin Keel, Eastern Area Director, Bureau of Indian Affairs (collectively, the "defendants" or the "federal defendants") appeal from a December 16, 1998 judgment of the United States District Court for the District of Connecticut (Robert N. Chatigny, District Judge) denying their motion

for summary judgment and granting the summary judgment motion of plaintiffs-appellees State of Connecticut, Town of Ledyard, Town of North Stonington, and Town of Preston (collectively, the "plaintiffs" or the "Connecticut plaintiffs"). The district court permanently enjoined the Secretary of the Interior from taking land into trust on behalf of the Mashantucket Pequot Tribe of Indians on grounds that it would violate 25 U.S.C. § 1754(b)(8). The material facts are not in dispute.

BACKGROUND

In January 1993, the Mashantucket Pequot Tribe of Indians (the "Tribe" or the "Mashantucket Pequots") applied to the Secretary of the Interior (the "Secretary") to have 165 acres of land presently owned by the Tribe in fee taken into trust for their benefit, pursuant to the Indian Reorganization Act, 25 U.S.C. § 461 *et seq.* ("the IRA"). Exercising his discretion pursuant to 25 U.S.C. § 465, and after applying the criteria set forth in 25 C.F.R. § 151.10, the Secretary agreed to take the land into trust in May, 1995. The Connecticut plaintiffs brought this lawsuit to block the Secretary's action and the Secretary deferred taking title to the land pending the outcome.

The plaintiffs' suit, under the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 702, seeks: (1) a declaration that the Secretary's actions violate the Connecticut Indian Land Claims Settlement Act (the "Settlement Act"), 25 U.S.C. §§ 1751-60; and (2) an order permanently enjoining the Secretary from taking the contested land into trust. The federal defendants argue that the Secretary's decision to take the land into trust was a valid exercise of his authority under § 465 of the IRA. On cross-motions for summary judgment, the district court, upon a determination that the Settlement Act prohibited the Secretary's action, permanently enjoined the Secretary from taking the contested 165

acres of land into trust for the Tribe's benefit. This appeal followed.

Underlying the present dispute in part is the remarkable reversal of fortune that the Mashantucket Pequots have enjoyed in recent years. When the Settlement Act was enacted in 1983, the Tribe was impoverished, with no obvious future source of revenue in sight. All of that changed dramatically in 1990 when the Tribe applied to conduct Class III gaming activities on its reservation, pursuant to the newly-enacted Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* *See Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1025-28 (2d Cir.1990) (describing the Tribe's application process and requiring Connecticut to enter into good faith negotiations with the Tribe to create a tribal-state compact). In less than a decade the approximately 300-member Mashantucket Pequot Tribe developed one of the most profitable casinos in the United States, the Foxwoods Resort Casino in Ledyard, Connecticut, grossing nearly $1 billion annually. *See* Julian Schriebman, Developments in Policy: Federal Indian Law, 14 Yale L. & Pol'y Rev. 353, 361 nn. 62-63 (1996).

The stakes are considerable for both sides. The tax revenues that plaintiffs will forgo have been estimated at $50,000 annually if the Tribe adheres to its stated intention to leave the 165 acres of land at issue in this case undeveloped. But if the Tribe develops the property, as plaintiffs suspect it might, the tax revenues annually forgone by one or more of these Connecticut plaintiffs could be in the several hundreds of thousands of dollars. The Connecticut plaintiffs are also concerned that an adverse ruling in this case will affect other lands that the Tribe owns or may acquire in the future. Although not directly at issue in this proceeding, the Tribe has applied to the Secretary to have an additional 1,200 acres of non-settlement land taken into trust.

DISCUSSION

We must begin with a brief description of the relevant statutes in order to frame the present dispute. Enacted in 1934, the IRA fundamentally restructured the relationship between Indian tribes and the federal government, reversing the Nineteenth Century goal of assimilation and embodying "principles of tribal self-determination and self-governance." *See County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 255, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992). Relevant to this appeal, the IRA authorizes the Secretary to take certain lands into trust for the benefit of an Indian tribe. *See* 25 U.S.C. § 465. The procedures governing the Secretary's exercise of discretion in this regard are set forth in Department of Interior regulations. *See* 25 C.F.R. Part 151;[1] *see* generally Mary Jane Sheppard, Taking Indian Land Into Trust, 44 S.D. L. Rev. 681 (1999) (describing the process by which Indian tribes may apply to have property taken into trust).

When the Secretary takes land into trust on behalf of a tribe pursuant to the IRA, several important consequences follow. Land held in trust is *generally* not subject to (1) state or local taxation, *see* 25 U.S.C. § 465; (2) local zoning and regulatory requirements, *see* 25 C.F.R. § 1.4(a); or, (3) state criminal and civil jurisdiction, unless the tribe consents to such jurisdiction, *see* 25 U.S.C. §§ 1321(a), 1322(a).

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[1] The Secretary must consider, among other things, "(b) The need of the individual Indian or the tribe for additional land; (c) The purposes for which the land will be used; (d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs; (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls; [and] (f) Jurisdictional problems and potential conflicts of land use which may arise." 25 C.F.R. § 151.10.

The Connecticut plaintiffs pin their hopes on the Settlement Act which, they argue, prevents the Secretary from taking into trust certain land, like the 165 acres here. The Settlement Act was the consequence of a 1976 lawsuit filed by the Tribe, long before it had any notion that it would become a casino owner, asserting title to several hundred acres of land in and around Ledyard, Connecticut. In that action, the Tribe claimed that in 1855 Connecticut had transferred nearly 800 acres of Tribe-owned land out of tribal hands without congressional approval, in violation of the Nonintercourse provisions of the Trade and Intercourse Act of 1790 (now codified at 25 U.S.C. § 177). *See* H.R. Rep. No. 98-43, at 2-3 (1983). The immediate effect of the 1976 lawsuit was to place a cloud on the title to hundreds of acres of privately and publicly owned land in Connecticut and to threaten to bring about many years of protracted litigation. The parties to the lawsuit negotiated a tentative settlement that included federal recognition of the Tribe, which would permit land to be taken into trust by the Secretary. Accordingly, an act of Congress was required to implement the terms of the settlement. On October 18, 1983, Congress enacted the Settlement Act to embody the agreement reached by the parties.[2]

The Settlement Act extinguished the Tribe's claims to hundreds of acres of land. *See* 25 U.S.C. § 1753. In exchange, the Settlement Act: (1) provided for federal recognition of the Tribe, *see id.* § 1758; (2) established a $900,000 fund

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[2] Congress has, at various times, provided legislative remedies for similar disputes throughout the country. *See* Rhode Island Indian Claims Settlement, 25 U.S.C. §§ 1701-12; Maine Indian Claims Settlement, 25 U.S.C. §§ 1721-35; Florida Indian (Miccosukee) Land Claims Settlement, 25 U.S.C. §§ 1741-50e; Massachusetts Indian Land Claims Settlement, 25 U.S.C. §§ 1771-71i; Washington Indian (Puyallup) Land Claims Settlement, 25 U.S.C. §§ 1773-73j; Seneca Nation (New York) Land Claims Settlement, 25 U.S.C. §§ 1774-74h; Mohegan Nation (Connecticut) Land Claims Settlement, 25 U.S.C. §§ 1775- 75h; Crow Boundary Settlement, 25 U.S.C. §§ 1776-76k.

(the "settlement fund"), designed principally for the purchase of private property, *see id.* § 1754; and (3) identified boundaries within which lands acquired by the Tribe would be held in trust by the Secretary and would constitute the Tribe's reservation, the so-called settlement lands, *see id.* §§ 1752(3), (4) & (7).

The Settlement Act distinguished between various types of property, however, and these distinctions form the basis for the present controversy. In relevant part, the Settlement Act provides the following definitions:

> (3) The term "private settlement lands" means—
>
> (A) the eight hundred acres, more or less, of privately held land which are identified by a red outline on a map filed with the secretary of the State of Connecticut in accordance with the agreement referred to in section 1751(d) of this title, and
>
> (B) the lands known as the Cedar Swamp which are adjacent to the Mashantucket Pequot Reservation as it exists on October 18, 1983. . . .
>
> (4) The term "settlement lands" means--
>
> (A) the lands described in sections 2(a) and 3 of the Act To Implement the Settlement of the Mashantucket Pequot Indian Land Claims as enacted by the State of Connecticut . . . and
>
> (B) the private settlement lands.

25 U.S.C. §§ 1752(3) & (4). The Act also defines "reservation" to mean "the existing reservation of the Tribe . . . and any settlement lands taken in trust by the United States for the Tribe." *Id.* § 1752(7). Essentially, then, the Settlement Act describes—and even expressly references—a map depicting the Tribe's pre-settlement reservation, and the publicly and privately owned land surrounding the reservation that comprises the settlement lands.

The Settlement Act contemplates that the Secretary would, at the request of the Tribe, use money from the $900,000 settlement fund to purchase additional land on behalf of the Tribe. *See id.* § 1754. The trust status of such acquisitions depends, at least in part, on the location of the purchased property. At the heart of the present controversy, under the title, "Mashantucket Pequot Settlement Fund," the Settlement Act provides, in relevant part:

> (b) Expending of Fund; private settlement lands; economic development plan; acquisition of land and natural resources
>
> * * * *
>
> As the Fund or any portion thereof is disbursed by the Secretary in accordance with this section, the United States shall have no further trust responsibility to the Tribe or its members with respect to the sums paid, any subsequent expenditures of these sums, or any property other than private settlement lands or services purchased with these sums.
>
> * * * *
>
> Lands or natural resources acquired under this subsection which are located within the settlement lands shall be held in trust by the United States for the benefit of the Tribe.
>
> Land or natural resources acquired under this subsection which are located outside of the settlement lands shall be held in fee by the Mashantucket Pequot Tribe, and the United States shall have no further trust responsibility with respect to such land and natural resources. Such land and natural resources shall not be subject to any restriction against alienation under the laws of the United States.

25 U.S.C. §§ 1754(b)(5), (7) & (8) (hereinafter, "§ (b)(5)," "§ (b)(7)," and "§ (b)(8)," respectively).

The general purpose of the Settlement Act is plain. After defining the land comprising the Indian's reservation, the Settlement Act provides a mechanism whereby the Mashantucket Pequot tribe is able to add property to its reservation. This much is undisputed by the parties: private settlement lands—lands acquired within the area defined in the Settlement Act—that are acquired with settlement funds are to be held in trust by the Secretary; non-settlement lands acquired with settlement funds are to be held in fee by the Tribe and the United States shall have no further trust responsibility with respect to such land. The property at issue in this case, however, falls outside the settlement lands and has been acquired by the Tribe without the use of settlement funds. The question, then, is whether § (b)(8) proscribes the Secretary from taking into trust lands that are outside the area demarcated as settlement lands, whether or not purchased with settlement funds, or whether § (b)(8) prohibits only the taking into trust of non-settlement lands that are purchased with settlement funds.

On cross-motions for summary judgment, the district court agreed with the Connecticut plaintiffs that § (b)(8) prohibits the Secretary from taking non-settlement lands purchased with non-settlement funds into trust for the benefit of the Tribe. The district court held that the phrase, "acquired under this subsection," within § (b)(8), was ambiguous and, turning to the Act's legislative history, found that Congress intended the statute broadly to resolve the geographical limits of the Tribe's sovereignty. *Connecticut v. Babbitt*, 26 F. Supp. 2d 397, 403-06 (D. Conn. 1998). In holding for the Connecticut plaintiffs, the district court refused to apply the Indian canon of statutory construction, which requires that ambiguous statutes be interpreted to favor Indian tribes, see infra Part IV, and also refused to accord deference to the Department of the

Interior's interpretation of the Settlement Act. *See Connecticut v. Babbitt*, 26 F. Supp. 2d at 407-09. Contrary to the district court, we believe that the structure and language of the Settlement Act demonstrates that § (b)(8) applies only to land purchased with settlement funds. Insofar as ambiguity remains, moreover, every tool of statutory construction at our disposal favors the federal defendants' interpretation of the statute.

I.

"In interpreting a statute, we begin with the language of the statute itself." *Tom Lange Co. v. Kornblum & Co.* (In re Kornblum & Co.), 81 F.3d 280, 285 (2d Cir. 1996) (internal quotation marks omitted). The Connecticut plaintiffs argue that the phrase "acquired under this subsection" means only "acquired by or for the Mashantucket Pequot Tribe," in which case § (b)(7) provides that "[l]ands . . . located within the settlement lands shall be held in trust," and § (b)(8) provides that "land . . . located outside the settlement lands shall be held in fee." According to the Connecticut plaintiffs, the Settlement Act creates a blanket rule: lands outside the settlement lands cannot be taken in trust by the Secretary. The plaintiffs' interpretation, however, renders the phrase "acquired under this subsection" superfluous, and we are required to "disfavor interpretations of statutes that render language superfluous." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992).

Reading § 1754 as a whole, we believe that the phrase "acquired under this subsection" in § (b)(8) is determinative of the statute's reach. Section 1754 is entitled "Mashantucket Pequot Settlement Fund," and section 1754(b) is entitled: "Expending of Fund; private settlement lands; economic development plan; acquisition of land and natural resources." These titles reflect the structure of the statute; § 1754 generally prescribes the use of the settlement fund and the internal

reference "acquired under this subsection" is logically read to mean "acquired with settlement funds."

This reading is confirmed by the phrase in § (b)(8) that "the United States shall have no further trust responsibility" over non-settlement lands. In order for the United States to have no "further" trust responsibilities, it must initially have had some trust responsibilities that are extinguished as to non-settlement lands. The source of those trust responsibilities is plain from the statute; it arises from the Secretary's trust responsibility over the settlement fund. It would be inconceivable for the United States to have no "further" trust responsibility under § (b)(8) unless the land had been purchased with settlement funds.

Accordingly, land acquired by the Tribe with settlement funds are either automatically taken into trust under § (b)(7) if they are within the boundaries of the settlement lands, or may not be taken into trust if outside those boundaries. The statute is silent with regard to lands, like the contested 165 acres here, not purchased with settlement funds. As to such lands, whether or not they are within settlement land boundaries, the Settlement Act does not apply. The Tribe may apply to the Secretary to take them into trust under the 1934 IRA, and the Secretary's decision will be governed by the considerations outlined in the relevant regulations. Nothing in § (b)(7) supplants the Secretary's power under the IRA to take into trust lands acquired without the use of settlement funds.

The Connecticut plaintiffs insist that chapter titles must give way to the unambiguous meaning of the text. They argue that § (b)(7) is plain on its face and that reliance on the chapter title is therefore proscribed by canons of construction. *See Thistlethwaite v. Dowty Woodville Polymer, Ltd.*, 110 F.3d 861, 866 (2d Cir. 1997) ("Headings and titles are not meant to take the place of the detailed provisions of the statutory text; nor are they necessarily designed to be a reference guide or a synopsis.") (internal quotation marks and altera-

tions omitted). The short answer to the plaintiffs' argument is that our reliance is not on the title of § 1754, but rather on the structure of the statute. We do not need the chapter title to inform us that § 1754(b) generally governs the disposition of the settlement fund. The chapter title in this case provides a convenient referent for the subject of the statutory section but we do not rely on it to describe the subsection's content. Plaintiffs' criticism is therefore misplaced. Moreover, to the extent that the meaning of the phrase "acquired under this subsection" is ambiguous, resort to chapter titles, as well as to other tools of statutory interpretation, is appropriate. *See United States v. Roemer*, 514 F.2d 1377, 1380 (2d Cir. 1975) (discussing *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 528-29, 67 S. Ct. 1387, 91 L. Ed. 1646 (1947)).

Plaintiffs also contend that our interpretation of § (b)(8) renders § 1754(b)(5) surplusage. We disagree. Section (b)(5) provides that:

> As the Fund or any portion thereof is disbursed by the Secretary in accordance with this section, the United States shall have no further trust responsibility to the Tribe or its members with respect to the sums paid, any subsequent expenditures of these sums, or any property other than private settlement lands or services purchased with these sums.

The Connecticut plaintiffs argue that if, as we believe, § (b)(8) proscribes the Secretary from taking into trust only non-settlement land purchased with settlement funds, then § (b)(5) would be redundant when it provides that the Secretary shall have no trust responsibility over lands other than private settlement lands purchased with settlement funds. Plaintiffs' argument misconstrues the meaning of § (b)(5).

Section (b)(5) pertains to trust responsibilities over the settlement funds and provides for the automatic stripping of trust

responsibilities "[a]s the fund . . . is disbursed." But § (b)(5) is silent as to the status of lands purchased with settlement funds. Sections (b)(7) and (b)(8) simply clarify the status of lands purchased with settlement funds. Settlement lands purchased with the funds are held in trust; non-settlement lands purchased with the funds are not, and the United States shall have no further trust responsibility over them.

Thus, the Settlement Act read as a whole strongly, if not conclusively, suggests that § (b)(8) applies only to lands purchased with settlement funds ("acquired under this subsection"). While it seems to us that little, if any, ambiguity remains on that score, to the extent the statute remains ambiguous, "we will turn to other sources to divine Congress' intent." *United States v. LaPorta*, 46 F.3d 152, 156 (2d Cir. 1994).

II.

If the text of a statute is ambiguous, we must look to the statute as a whole and construct an interpretation that comports with its primary purpose and does not lead to anomalous or unreasonable results. *See American Tobacco Co. v. Patterson*, 456 U.S. 63, 71, 102 S. Ct. 1534, 71 L. Ed. 2d 748 (1982) ("Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible."); *Castellano v. City of New York*, 142 F.3d 58, 67 (2d Cir. 1998) ("Where the language is ambiguous, we focus upon the 'broader context' and 'primary purpose' of the statute."). We find support for our interpretation in the purpose of the Settlement Act.

The Connecticut plaintiffs characterize the Settlement Act as a "delicately balanced compromise" establishing the maximum extent to which tribal land could be removed from local control. The district court agreed, finding that

> [i]t is unreasonable to suppose that the parties negotiated a settlement to include these arrangements and yet in-

> tended to allow the Secretary to take into trust for the benefit of the Tribe any and all land acquired by the Tribe in the future, as long as the land was not purchased with Settlement Fund money.

Connecticut v. Babbitt, 26 F. Supp. 2d at 406. We disagree.

The Settlement Act was not, as the Connecticut plaintiffs argue, a comprehensive statute intended to settle once-and-for-all the extent of the Mashantucket Pequot's sovereignty. Rather, it emerged from the specific land dispute arising out of the 1976 lawsuits filed by the Tribe. The congressional findings contained within the Settlement Act itself suggest that the purpose of the Act was more parochial than the Connecticut plaintiffs contend. The statute recites that "the pendency of [the Tribe's] lawsuit has placed a cloud on the titles to much of the land in the town of Ledyard, including lands not involved in the lawsuit, which has resulted in severe economic hardships for the residents of the town." 25 U.S.C. § 1751(b). Therefore, the Act continues, "Congress shares with the State of Connecticut and the parties to the lawsuit a desire to remove all clouds on titles resulting from such Indian land claims." Id. at § 1751(c). Congress saw the Settlement Act as providing the necessary federal implementation of the private agreement negotiated between the parties that would end the existing lawsuit. See id. at § 1751(d). Nothing in the Act indicates that Congress intended to establish the outermost boundaries of the Tribe's sovereign territory.

Our conclusion finds strong support in the Maine Indian Claims Settlement Act ("Maine Settlement Act"), 25 U.S.C. §§ 1721-35, enacted in 1980, which both parties concede was a model for the Mashantucket Pequot's Settlement Act. In marked contrast to the Settlement Act, the Maine Settlement Act has a broad provision that prevents lands not specifically covered by that Act from being taken into trust by the Secretary:

> Except for the provisions of this subchapter, the United States shall have no other authority to acquire lands or natural resources in trust for the benefit of Indians . . . in the State of Maine.

25 U.S.C. § 1724(e).

Located within a statutory section entitled, in part, "other acquisition authority barred for benefit of Indians in State of Maine," this provision is plain on its face and decisively supplants the Secretary's authority to take land into trust under the 1934 IRA beyond that expressly contemplated by the Maine Settlement Act.

Plaintiffs counter with a contrasting interpretation of the Maine Settlement Act. The distinct purpose of § 1724(e), they argue, is to prohibit the Secretary from taking land into trust on behalf of any Indian tribes other than the three named in the Maine Settlement Act, whereas in Connecticut the Secretary retains the right to take land into trust on behalf of other Indian tribes.

Plaintiffs' construction of the Maine Settlement Act, while superficially plausible, is unconvincing. We have compared both statutes and find in the Maine Settlement Act an obvious demonstration that Congress knew how to prohibit the Secretary from taking into trust any lands outside of specifically designated settlement lands. The absence of an analogous provision in the Settlement Act at issue in this case confirms that the Settlement Act was not meant to eliminate the Secretary's power under the IRA to take land purchased without settlement funds into trust for the benefit of the Tribe.

Plaintiffs urge us to reject an interpretation of § (b)(8) that will create a "checkerboard" jurisdiction. The Settlement Act provides expressly that Connecticut retains civil and criminal jurisdiction over the Tribe's reservation, *see* 25 U.S.C. § 1755, while non-settlement lands taken into trust would, they argue, be immune from state jurisdiction. The

district court concluded that if the Tribe is permitted to extend its trust lands outside of the settlement lands then "the Tribe would have greater autonomy with regard to those parcels than it has within the reservation defined by the statute." *Connecticut v. Babbitt*, 26 F.Supp.2d at 407.

The plaintiffs are correct that the defendants' interpretation could result in a checkerboard jurisdiction. Of course, any success on the part of the Tribe in achieving trust status of its non-settlement lands will depend upon the ultimate outcome of administrative proceedings after the Connecticut plaintiffs' challenge thereto has been determined. In any event, the possibility of heterogeneous jurisdictional areas within the Mashantucket Pequot's lands does not compel a different result in this case. *See Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 502, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1979) ("In short, checkerboard jurisdiction is not novel in Indian law. . . ."). While we might question the wisdom of different jurisdictional provisions governing different trust lands, we will not provide a strained interpretation of the Settlement Act simply to avoid such a result.

III.

Nothing in the Settlement Act's legislative history compels a different conclusion than the one we reach.[3] In fact, it offers us little guidance. Both parties point primarily to reports

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[3] We note that the Settlement Act appears, in some ways, more like a private agreement between two parties than like a typical federal statute. Nevertheless, our methods of statutory interpretation remain unchanged. When called on to interpret a compact between two states that had been ratified by Congress, the Supreme Court held: "We previously have pointed out that a congressionally approved compact is both a contract and a statute, and we repeatedly have looked to legislative history and other extrinsic material when required to interpret a statute which is ambiguous." *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n. 5, 111 S. Ct. 2281, 115 L. Ed. 2d 207 (1991) (internal citations omitted).

from the Senate Select Committee on Indian Affairs, S.Rep. No. 98-222, 98th Cong., 1st Sess. (1983), and the House Committee on Interior and Insular Affairs, H.R. Rep. No. 98-43, 98th Cong., 1st Sess. (1983). The plaintiffs rely on the following language that appears identically in both reports:

> Section [1754](b)(8) specifically provides that lands not falling within the definition of "settlement lands" are to be held in fee by the Mashantucket Pequot Tribe and are not to be taken in trust by the United States. It provides further that the United States shall have no trust responsibility with respect to those lands. Finally, the subsection provides that these lands will not be subject to any restraint against alienation imposed by the laws of the United States.

S. Rep. 98-222 at 14; H.R. Rep. No. 98-43 at 9. While this passage at first blush appears to support the Connecticut plaintiffs' position, in fact it simply mirrors the weakness in their textual argument. The quoted language appears in a larger section that refers generally to the settlement fund. The same committee reports limit the reach of § 1754(b) to lands purchased with settlement funds, stating that "[s]ection [1754](b) establishes the terms under which the settlement fund is to be administered." H.R. Rep. 98-43 at 7; S. Rep. 98-222 at 12. Therefore, the relevant legislative history directly dealing with subsection (b) is no less ambiguous than the statute itself. Absent additional guidance within the sparse legislative record, we are unpersuaded that Congress expressed a discernible intent that § (b)(8) limit the authority of the Secretary to take non-settlement lands into trust, other than lands acquired with settlement funds.

Turning to other aspects of the legislative history, we find only ambiguity, contradiction, and silence. For example, the House Committee emphasized the language "acquired under this subsection," stating that § (b)(7) "provides that land or natural resources acquired pursuant to subsection [§ 1754(b)]

and located within the settlement lands" are to be taken into trust. H.R. Rep. 98-43 at 9 (emphasis added).

On the other hand, the Senate Committee found that § (b)(7) "provides that land or natural resources acquired pursuant to subsection [1754(b)] or otherwise lawfully acquired and located within the settlement lands" are to be held in trust, S. Rep. 98-222 at 14 (emphasis added), whereas § (b)(8) applies more generally to any "lands not falling within the definition of 'settlement lands.' " Id. In other words, § (b)(8), unlike § (b)(7), includes no provision referencing how the land was acquired. However, any support plaintiffs seek to garner in the Senate Committee's report, is undermined by the report's reliance elsewhere on a number of proposed amendments to the Settlement Act that were ultimately rejected. One amendment would have removed the phrase "under this subsection" from § (b)(7), so that § (b)(7) applied to all settlement lands "acquired" whereas § (b)(8) applied only to non-settlement lands "acquired under this subsection." Id. at 4. Accordingly, we will not place stock in a legislative history that is on-the-whole considerably more ambiguous than the statute itself.

IV.

Our interpretation of § (b)(8) finds substantial additional support in the unique canon of construction governing statutory provisions involving Indians. As the Supreme Court has often reiterated, "the standard principles of statutory construction do not have their usual force in cases involving Indian law." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985). "[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Id.*

"In determining [congressional] intent, we are cautioned to follow the general rule that doubtful expressions are to be resolved in favor of the weak and defenseless people who are

the wards of the nation, dependent upon its protection and good faith." *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586, 97 S. Ct. 1361, 51 L. Ed. 2d 660 (1977) (internal quotation marks and alterations omitted). As the Court explained, in one of its early formulations:

> In construing any treaty between the United States and an Indian tribe, it must always . . . be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States. . . .

Jones v. Meehan, 175 U.S. 1, 10-11, 20 S. Ct. 1, 44 L.Ed. 49 (1899).

The Connecticut plaintiffs contend that the Indian canon of construction has no application in this case--not to these Indians—because of the Mashantucket Pequot's tremendous wealth. To be sure, the Tribe today is hardly comprised of weak and defenseless people. Indeed, the economic power and legal acumen of the Mashantucket Pequots bears no discernible resemblance to that of the Indian tribes on whose behalf the Indian canon of construction was first developed.

The fact that the Tribe today is at no practical disadvantage does not strip the Indian canon of its force. The Supreme Court has applied the canon where Indians were at no legal disadvantage. For example, in *Oregon Department of Fish &*

Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 105 S. Ct. 3420, 87 L. Ed. 2d 542 (1985), the Court noted that during the original negotiation of the treaty at issue in that case, "[t]he Tribe was assisted by counsel and actively asserted its interests when those interests diverged from the proposals of the United States." *Id.* at 758, 105 S. Ct. 3420. The Court nevertheless held that "doubts concerning the meaning of a treaty with an Indian tribe should be resolved in favor of the tribe." *Id.* at 766, 105 S. Ct. 3420.

Moreover, the Mashantucket Pequot's present wealth postdates the Settlement Act. At the time of enactment in 1983, the conditions of the Mashantucket Pequots were more consistent with the premise underlying the Indian canon of statutory construction. Even if we would endorse plaintiffs' view that the Indian canon of construction applies with less force to statutes or treaties negotiated with a wealthy, powerful, and well-represented Indian tribe, it has no application here.

V.

Finally, the deference we generally owe to an agency's interpretation of an ambiguous statute supports our view of this appeal. In cases like this one, it bears repeating that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, accord *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 233, 106 S. Ct. 2860, 92 L. Ed. 2d 166 (1986). Insofar as agency deference remains appropriate in this case, it confirms our interpretation of the Settlement Act. The Department of the Interior has determined that: "Inasuch as section 1754 relates in its entirety to the Tribe's trust fund, none of its subprovisions as set forth above govern the status

of lands acquired by other means with non-trust fund monies."

The plaintiffs argue that Chevron deference is inappropriate in this case for two reasons: (1) because less deference is owed to agency determinations that expand an agency's jurisdiction; and (2) the agency determination in this case is not well-settled as the agency's current position represents a complete reversal of its earlier position. Both arguments lack merit.

In support of their argument that the agency is entitled to less deference if the provision in question limits agency action, plaintiffs point to our prior holding that

> Courts construing statutes enacted specifically to prohibit agency action ought to be especially careful not to allow dubious arguments advanced by the agency in behalf of its proffered construction to thwart congressional intent expressed with reasonable clarity, under the guise of deferring to agency expertise on matters of minimal ambiguity.

Independent Ins. Agents of Am., Inc. v. Board of Governors of Fed. Reserve Sys., 838 F.2d 627, 632 (2d Cir. 1988). The principle is inapplicable here. First, we disagree that the Settlement Act was enacted "specifically to prohibit agency action" as the plaintiffs contend. Second, we disagree that the agency's construction of the statute in this case is contrary to plainly expressed congressional intent; if it were, we would of course defer to Congress. *See Chevron*, 467 U.S. at 842-43, 104 S. Ct. 2778. Plaintiffs' argument is accordingly misplaced.

Plaintiffs are correct that an agency interpretation at odds with an earlier position taken by the agency is entitled to less deference than we generally accord under *Chevron*. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987) ("An agency interpretation of a

relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view.") (internal quotation marks omitted); *American Mining Cong. v. EPA*, 824 F.2d 1177, 1182 (D.C. Cir. 1987). The Connecticut plaintiffs point to a 1988 opinion letter from the Regional Solicitor of the Department of the Interior who indicated his view that "[l]ands located outside the 'settlement lands' must be held in fee." Two years later in 1990, but still three years prior to the trust application giving rise to the instant suit, the same Regional Solicitor reconsidered his original position and determined that the Settlement Act "does not restrict the application of [the IRA] to the Pequot Tribe."

The parties argue over whether the agency's now ten-year-old position on this matter is well-settled. We believe that it is. The Department of the Interior has provided a reasoned analysis in support of its new determination that § (b)(8) refers only to land purchased with money from the settlement fund. But even according less deference than usual, we would still take account of the agency's position. *See Rust v. Sullivan*, 500 U.S. 173, 186- 87, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991) (deferring to a changed agency interpretation where the agency "amply justified [its] change of interpretation with a reasoned analysis.") (citation omitted).

Motivating all of plaintiffs' arguments is their final claim that a decision today in defendants' favor would theoretically make it possible for the Secretary to take into trust virtually all of southeastern Connecticut. And indeed, we find nothing in the Settlement Act itself that would prevent such a result. But this is a policy argument better addressed to Congress; it is not a basis for arriving at a strained interpretation of the Settlement Act. Other federally recognized Indian tribes are not saddled with a geographical limit to the land that can be taken into trust by the Secretary. We see no reason to fashion a rule that limits the Tribe from seeking authorization, after

administrative proceedings, to have land placed into trust with the Secretary simply because the Mashantucket Pequots now have the purchasing power to make substantial real estate acquisitions. While we are aware of Connecticut's concern that the Tribe may pose a threat to its sovereignty, it is not our function to compensate judicially for Connecticut's or Congress's failure to provide for the Tribe's recent economic good fortune. In our view, the Connecticut plaintiffs' challenge is more appropriately presented as a challenge to the Secretary's exercise of discretion under the IRA, and in that regard we express no view.

CONCLUSION

For the reasons set forth above, the judgment of the district court is reversed, and the case remanded for further proceedings consistent with this opinion. We have closely considered all of plaintiffs' remaining arguments and find them without merit.

APPENDIX B

UNITED STATES DISTRICT COURT,
D. CONNECTICUT.

Nos. 3:95CV849 (RNC), 3:95CV1211 (RNC).

STATE OF CONNECTICUT, ex rel. RICHARD BLUMENTHAL, ATTORNEY GENERAL OF THE STATE OF CONNECTICUT,
Plaintiff,

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, UNITED STATES OF AMERICA, DEFENDANT. TOWNS OF LEDYARD, NORTH STONINGTON, AND PRESTON, CONNECTICUT,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA, BRUCE BABBITT, SECRETARY OF THE DEPARTMENT OF THE INTERIOR, ADA DEER, ASSISTANT SECRETARY OF THE INTERIOR FOR INDIAN AFFAIRS, AND FRANKLIN KEEL, ACTING AREA DIRECTOR FOR THE EASTERN AREA OFFICE OF THE BUREAU OF INDIAN AFFAIRS,
Defendants.

Dec. 15, 1998.

RULING ON MOTIONS FOR SUMMARY JUDGMENT

CHATIGNY, District Judge.

In these consolidated actions, the State of Connecticut and three Connecticut towns challenge a decision of the Secretary of the Interior to take into trust, for the benefit of the Mashantucket Pequot Tribe of Indians, 165 acres of land owned by the Tribe. Plaintiffs claim that the Connecticut Indians Land

Claims Settlement Act (the "Settlement Act" or "Act"), 25 U.S.C. §§ 1751-60, prohibits the Secretary from taking the land into trust. The Secretary contends that his decision is a valid exercise of his general authority under section 5 of the Indian Reorganization Act (the "IRA"), 25 U.S.C. § 465, to take land into trust for the benefit of Indians. Each party has moved for summary judgment. For reasons that follow, the court concludes that the Secretary's decision violates the Settlement Act. Accordingly, plaintiffs' motions for summary judgment [doc. # 69 and doc. # 91] are granted and defendants' motion [doc. # 65] is denied.[1]

Background

The material facts are not in dispute. In January 1993, the Tribe filed an application asking the federal government to take into trust, for the benefit of the Tribe, title to certain parcels of land owned by the Tribe in the towns of Ledyard, North Stonington and Preston. The application initially requested transfer of approximately 245 acres. In May 1995, the government announced that it intended to take the land into trust. The Secretary subsequently agreed to defer taking title to the land in anticipation of the present litigation.

While this litigation was pending, the Tribe withdrew its request with regard to approximately 80 acres of land in-

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[1] Plaintiffs also contend that section 5 of the IRA, pursuant to which the Secretary purports to act, represents an unconstitutional delegation of authority to the executive branch and violates the Tenth Amendment; that the Mashantucket Pequot Tribe of Indians are not "Indians" as that term is used in the IRA; and that the Secretary's decision to take the land at issue into trust for the benefit of the Tribe is arbitrary, capricious and in violation of the National Environmental Policy Act and Coastal Zone Management Act. Because plaintiffs' argument based on the Settlement Act is dispositive, it is unnecessary to address plaintiffs' other contentions.

cluded in the original application.[2] In May 1996, the Secretary issued a notice that the rest of the land, totaling approximately 165 acres, would be taken into trust.

Plaintiffs challenge the Secretary's decision pursuant to the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 702, et seq. They seek a declaration that the Secretary's decision violates the Settlement Act and an order permanently enjoining the Secretary from taking the land into trust.

Discussion

The question presented by the pending motions is whether the Settlement Act prohibits the Secretary from taking the 165 acres at issue into trust for the Tribe pursuant to his general authority to take land into trust under section 5 of the IRA (the Secretary's § 465 authority). The parties agree that the Settlement Act limits the Secretary's § 465 authority to some degree. However, they disagree on the scope of the limitation.

Plaintiffs claim that § 1754(b)(8) of the Act prohibits the Secretary from taking land into trust for the benefit of the Tribe if the land is located outside the "settlement lands" as defined in § 1752 of the Act (the "settlement lands"). Because the land at issue in this case is outside the boundaries of the settlement lands, plaintiffs contend that § 1754(b)(8) prohibits the Secretary from exercising his § 465 authority to take the land into trust. Defendants maintain that §1754(b)(8) prohibits the Secretary from exercising his general authority to take land into trust for the benefit of the Tribe only if the land is

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[2] The withdrawal occurred after it was discovered that the 80 acres had been purchased with funds provided to the Tribe through the Mashantucket Pequot Settlement Fund created pursuant to the Settlement Act See 25 U.S.C. § 754(a). Under defendants' reading of the Settlement Act, described further below, that fact rendered the 80 acres ineligible for trust status.

located outside the settlement lands and has been purchased with federal money provided to the Tribe pursuant to the Settlement Act. Because the land at issue was purchased with other money, defendants contend that § 1754(b)(8) does not bar the Secretary from taking the land into trust.

In practical terms, the issue is whether the area under the sovereignty of the Tribe can be expanded against the wishes of the State and the Towns without congressional approval. The plaintiffs contend, in effect, that the Settlement Act fixed the boundaries of the territory that may become part of the Tribe's reservation and that further territory may not be placed under the sovereignty of the Tribe except by act of Congress. The defendants, on the other hand, contend that the Settlement Act enabled the Tribe to expand its reservation within the boundaries set forth in the Act without disturbing the Secretary's § 465 authority to further expand the area under the Tribe's sovereignty by taking more land into trust for the Tribe.

This appears to be the first case in which a state has opposed a trust acquisition by the Secretary on the ground that the acquisition is barred by a federal statute approving an Indian land claims settlement. Congress has enacted numerous settlement acts. *See* 25 U.S.C. § 1701 et seq. One of them contains a provision expressly precluding the federal government from relying on any other authority to acquire land in trust for the benefit of the Indians. *See* Maine Indian Claims Settlement Act, 25 U.S.C. § 1724(e). Another contains a provision expressly preserving the federal government's authority to take land into trust for the benefit of the Indians under § 465. *See* Washington Indian (Puyallup) Land Claims Settlement Act, 25 U.S.C. § 1773c. The Settlement Act does not contain such an express provision one way or the other. However, using traditional tools of statutory construction, it appears that Congress, in enacting the Settlement Act, in

tended to approve a unique jurisdictional arrangement worked out by the Tribe and the State that could not be disturbed without congressional approval. Accordingly, the plaintiffs are entitled to summary judgment in their favor.[3]

To understand the parties' arguments, it is helpful to review the relevant statutory framework. In 1934, Congress enacted the IRA as part of a comprehensive restructuring of the manner in which the federal government dealt with Indians and Indian issues. See Felix S. Cohen, Handbook of Federal Indian Law 83-87 (1988 ed.).[4] Section 5 of the IRA, codified at 25 U.S.C. § 465, grants the Secretary broad authority to acquire land for Indians, either by purchase or other means, and to take that land into trust.[5]

Land taken into trust under § 465 is insulated from state and local control in at least three important respects. First,

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[3] Summary judgment may be granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1985). Because the material facts are not in dispute, and plaintiffs have a legal right to the relief they seek, summary judgment is appropriate.

[4] The purpose of the IRA was "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973).

[5] Section 465 provides in relevant part:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians. . . .Title to any land acquired pursuant to [section 465] shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such land or rights shall be exempt from State and local taxation.

trust land is considered "Indian country" for jurisdictional purposes. *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991). As such, it is removed from state civil and criminal jurisdiction, unless the tribe consents to such jurisdiction. 25 U.S.C. §§ 1321, 1322. Second, pursuant to the terms of § 465, trust land is exempt from state and local taxation. 25 U.S.C. § 465. And third, under regulations of the Department of the Interior, trust land is exempt from state and local land use regulation, in the absence of a specific dispensation from the Secretary, which is to be based upon "the best interest of the Indian owner or owners." 25 C.F.R. § 1.4; *see also Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 664-66 (9th Cir. 1975).

In 1983, Congress passed the Settlement Act.[6] The purpose of the legislation was "to provide Congressional ratification and implementation of a settlement of claims to land and consequential damages that [had] been raised [in a federal lawsuit filed] by the Mashantucket Pequot Tribe" in 1976. S. Rep. No. 98-222, 98th Cong., 1st Sess. 5 (1983); *see* 25 U.S.C. § 1751(a). In the underlying lawsuit the Tribe had asserted claims arising from mid-nineteenth century transactions involving land "formerly held by the Tribe." H.R. Rep. No. 98-43, 98th Cong., 1st Sess. 1 (1983). The Tribe claimed that those transactions "violated the Nonintercourse . . . pro-

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[6] The Settlement Act became law on October 18, 1983, upon President Reagan's signature of S.1499. An earlier version of the legislation, S.366, had been vetoed by the President on April 5, 1983. The bill signed on October 18 was identical to the vetoed legislation except for a small change in the provision codified at 25 U.S.C. § 1751(f). *See* S. Rep. No. 98-222, 98th Cong., 1st Sess. 8-9 (1983). The counterpart to this legislation in the House was designated H.R.982.

vision of the Trade and Intercourse Act," id., which contained a restraint against alienation of Indian lands.[7]

The defendants named in the Tribe's complaint were private parties in possession of the disputed lands. The State subsequently entered the action as a third-party defendant and became an active participant in the litigation. *See Western Pequot Tribe of Indians v. Holdridge Enterprises Incorporated, et al.*, Civil Action No. H76-193 (D. Conn.). In 1980, a motion to dismiss a similar lawsuit presenting aboriginal land claims was rejected by this court. *See Mohegan Tribe v. State of Connecticut*, 483 F. Supp. 597 (D. Conn.) (denying State's motion to dismiss on the basis that the Nonintercourse Act allegedly applied only to western areas of the United States, and not to the earlier settled eastern states), *aff'd*, 638 F.2d 612 (2d Cir. 1980), *cert. denied*, 452 U.S. 968, 101 S. Ct. 3124, 69 L. Ed. 2d 981 (1981). Following that decision, the Tribe, the defendant landowners and the State reached a settlement agreement.[8] That agreement became the Settlement Act. *See* S. Rep. No. 98-222, 98th Cong., 1st Sess. 5 (1983) ("[t]he settlement embodied in this Act was negoti-

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[7] The current version of this provision, which has since become known as the "Nonintercourse Act," is codified at 25 U.S.C. § 177.

[8] Local Rule 16 notice filed by the Tribe on October 15, 1979 stated: "Plaintiff notifies the Court pursuant to Rule 16 of the local rules of this District Court that no action has been taken in this matter during the past year because settlement discussions are under way in this action, but have been stalled pending a resolution of the Motion to Dismiss . . . in *Mohegan Tribe v. State of Connecticut*, [483 F. Supp. 597] Civil Action No. H-77-434. A decision by this District Court on that Motion is expected in the near future, and it is anticipated that settlement discussions with the office of the governor of the State of Connecticut will proceed if a decision favorable to the plaintiff in the Mohegan case is rendered. The governor's office has indicated interest in supporting a settlement. . . ." Pl.'s Loc.Rule 16 *Notice, Western Pequot Tribe of Indians v. Holdridge Enterprises Incorporated, et al.*, Civil Action No. H76-193 (D. Conn. Oct. 15, 1979).

ated by the Mashantucket Pequot Tribe, the private landowners affected by the claim, and the State of Connecticut").

Like other federal statutes resolving Indian land claims, the Act addressed concerns besides ownership of the lands at issue in the underlying lawsuit.[9] The Act reflects that "the parties bargain[ed] for an arrangement with which they [could] live in the future," Staff Memorandum—The Veto of S.366, The Mashantucket Pequot Indian Claims Settlement Act, in Mashantucket Pequot Indian Land Claims: Hearing on S.1499 Before the Senate Comm. on Indian Affairs, 98th Cong., 1st Sess. 32 (1983)—that is, an arrangement providing a settlement of disputed issues "once and for all." Settlement of Indian Land Claims in the States of Connecticut and Louisiana: Hearing on H.R.5358 and H.R.6612 Before the House Comm. on Interior and Insular Affairs, 97th Cong., 2nd Sess. 56 (1982) (prepared statement of Congressman Samuel Gejdenson of Connecticut).

The Act provided for federal recognition of the Tribe, which previously had been recognized only by the State. The Act redefined the Tribe's "reservation" to encompass "the existing [State-recognized] reservation of the Tribe," which consisted of about 200 acres, plus "any settlement lands taken in trust by the United States for the Tribe." 25 U.S.C. § 1752(7). The Act acknowledged the conveyance by the State to the Tribe of a twenty acre tract, and designated

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[9] The precise terms of the settlement acts vary widely. However, in addition to providing for the extinguishment of the tribe's aboriginal claims, the acts typically grant the tribe land or money to buy land, and stipulate arrangements for future relations among the tribe, state, local municipalities and the federal government in regard to issues such as jurisdiction and the tax status of the tribal land. *See* 25 U.S.C. § 1701 et seq.; Staff Memorandum—The Veto of S.366, The Mashantucket Pequot Indian Claims Settlement Act, in Mashantucket Pequot Indian Land Claims; Hearing on S.1499 Before the Senate Comm. on Indian Affairs, 98th Cong., 1st Sess. 32 (1983)

this tract part of the settlement lands, making it eligible for inclusion in the new federal reservation. 25 U.S.C. § 1752(4). The Act granted the Tribe the right to further expand the size of the reservation through purchases of additional settlement lands in a designated area of privately held lands, up to a maximum size of approximately 2,300 acres. 25 U.S.C. §§ 1752(3), (4) and (7), and § 1754(9).[10] The Act fixed the boundaries of that area with precision by approving and adopting an agreed upon line of demarcation drawn on a map. 25 U.S.C. § 1752(3). The Act provided the Tribe with $900,000 in federal funds (the "Settlement Fund") to enable it to buy land within that area. 25 U.S.C. §§ 1754(a), (b)(1), (b)(2), (e) and 1752(3), (4), (7).[11]

The Act confirmed the status of the Tribe's reservation as "Indian country," 25 U.S.C. § 1755, and affirmed that a federal restraint against alienation pursuant to the Nonintercourse Act, 25 U.S.C. § 177, applied to the lands of the reservation. 25 U.S.C. § 1757. Significantly for present purposes, the Act also declared that the reservation would be "subject to State jurisdiction to the maximum extent provided in [25 U.S.C. § 1321 *et seq.*]." 25 U.S.C. § 1755. Pursuant to that provision, the State retained the right to exercise civil and criminal jurisdiction over any lands acquired by or for the Tribe inside the settlement lands.

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[10] Memorandum from the Acting Area Director of the Bureau of Indian Affairs ("BIA"), Eastern Area, to the Acting Deputy Commissioner for Indian Affairs, dated January 27, 1995, in Administrative Record, I-W-5-6.

[11] The Act provided that at least $600,000 of the Settlement Fund would be made available to the Tribe immediately to enable it to acquire "settlement lands" as defined in § 1752 of the Act. The Act further provided that any balance remaining in the Settlement Fund after the Tribe had completed its purchases of settlement lands could be disbursed to the Tribe but only pursuant to an approved economic development plan. See 25 U.S.C. §§ 1754(b)(1) and (2).

Several provisions of the Act addressed the trust responsibility of the federal government with regard to the Tribe. The parties' dispute concerning the impact of the Settlement Act on the Secretary's § 465 authority implicates these provisions. Section 1754(b)(5) of the Act provides:

> As the [Settlement] Fund or any portion thereof is disbursed by the Secretary in accordance with this section, the United States shall have no further trust responsibility to the Tribe or its members with respect to the sums paid, any subsequent expenditures of these sums, or any property other than private settlement lands or services purchased with these sums.

Section 1754(b)(7) provides:

> Lands or natural resources acquired under this subsection which are located within the settlement lands shall be held in trust by the United States for the benefit of the Tribe.

And, most important for present purposes, § 1754(b)(8) provides:

> Land or natural resources acquired under this subsection which are located outside of the settlement lands shall be held in fee by the Mashantucket Pequot Tribe and the United States shall have no further trust responsibility with respect to such land and natural resources. Such land and natural resources shall not be subject to any restriction against alienation under the laws of the United States.

The parties' dispute centers on the meaning of the phrase "acquired under this subsection" in § 1754(b)(8). Plaintiffs suggest, in effect, that the phrase means "acquired by or for the Mashantucket Pequot Tribe." Thus construed, the phrase renders § 1754(b)(8) a prohibition against the Secretary's accepting into trust any land located outside the settlement lands. The defendants contend that § 1754(b) of the statute,

the section in which subsection (8) appears, pertains to the use of the Settlement Fund and, accordingly, that the phrase "acquired under this subsection" means "purchased with money from the Settlement Fund." Construed in this manner, the provision's acknowledged prohibition on the Secretary's § 465 authority is not triggered in this case because the land at issue was not purchased with Settlement Fund money.

After considering the parties' submissions, the court concludes that the text of § 1754(b)(8) is ambiguous, requiring consideration of other evidence of legislative intent. The subdivision is ambiguous primarily because the phrase "acquired under this subsection" lacks intrinsic meaning. To attempt to ascribe meaning to the phrase, one can look to the other features of the subsection, but that exercise is also inconclusive. Most of the subdivisions in subsection (b) refer to the Settlement Fund, lending some weight to the defendants' suggested reading of the text, but not all of them do; like section (8), sections (7), (9) and (3)(B) and (D) do not mention the Settlement Fund. Moreover, the title of subsection (b) refers to topics other than "[e]xpending of [the] Fund," indicating that the subsection does not relate exclusively to use of Settlement Fund monies. Indeed, the broad, unqualified reference in the subsection title to "acquisition of land and natural resources" supports the plaintiffs' position that Congress intended the subsection to address any acquisition of land and natural resources by or for the Tribe.[12]

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[12] That subsection (b) was intended to address topics unrelated to the Settlement Fund is further supported by reference to the legislative history. The report of the Select Senate Committee on Indian Affairs that accompanied the legislation stated in regard to subsection (b) generally: "Section [1754](b) establishes the terms under which the settlement fund is to be administered. This subsection contains several further subdivisions." S. Rep. No. 98-222, 98th Cong., 1st Sess. 5 (1983) (emphasis added).

Because the text of the statute is ambiguous, examination of other indicia of statutory meaning is necessary. *See, e.g., United States v. LaPorta*, 46 F.3d 152, 156 (2nd Cir.1994) ("when the text proves to be ambiguous, we will turn to other sources to divine Congress' intent"); *Cusanelli v. Klaver*, 698 F.2d 82, 86 (2nd Cir.1983); *Blum v. Stenson*, 465 U.S. 886, 896, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984).[13] When other aids to statutory construction are considered, it becomes apparent that plaintiff's interpretation of the statute is correct. The legislative history of § 1754(b)(8),[14] the relationship between § 1754(b)(8) and other provisions of the statute,[15] and

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[13] Even if § 1754(b)(8) were not ambiguous, the "literal meaning" urged by defendants would not be determinative. Reliance upon "other evidence of Congressional intent" is appropriate--indeed it is necessary--when the literal meaning of a text produces a result that is "difficult to fathom." *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 454, 109 S. Ct. 2558, 105 L. Ed. 2d 377 (1989) (Brennan, J.). In addition, "[t]he plain meaning of a statute may not be controlling in those rare cases when 'literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' " *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 297 (2d Cir. 1998) (quoting *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313 (2d Cir. 1995)). In this case, the defendants' literal interpretation of § 1754(b)(8) would produce results that cannot be reconciled with other significant indicators of statutory meaning.

[14] *See Salute v. Stratford Greens Garden Apartments*, 136 F.3d at 297 (referring to legislative report in order to determine intentions of drafters); *U.S. v. Skinner*, 946 F.2d 176, 178 (2d Cir. 1991) (indicating in dicta that where legislative history contradicts language of statute, even unambiguous language, construction that deviates from language is permissible).

[15] *See United States Nat'l Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 454-455, 113 S. Ct. 2173, 124 L. Ed. 2d 402 (1993) (Souter, J.) ("Over and over we have stressed that in expounding a statute, [courts] must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.... Statutory construction is a holistic endeavor, and, at a minimum, must account for a statute's full text, ... structure, and subject matter." [Citations and internal quotation marks omitted.]).

the purpose of the statute,[16] all indicate that the drafters intended § 1754(b)(8) to bar the Secretary from accepting into trust for the Tribe land located outside the "settlement lands" as defined in § 1752 of the Act, regardless of the source of the purchase money.

The legislative history of § 1754(b)(8) strongly indicates that plaintiffs' interpretation is correct. Two items from the legislative history are particularly important in this regard: the report of the Senate Select Committee on Indian Affairs, and the report of the House Committee on Interior and Insular Affairs. The two reports contain identical statements regarding § 1754(b)(8). They state:

> Section [1754](b)(8) specifically provides that lands not falling within the definition of 'settlement lands' are to be held in fee by the Mashantucket Pequot Tribe and are not to be taken in trust by the United States. It provides further that the United States shall have no trust responsibility with respect to those lands. Finally, the subsection provides that these lands will not be subject to any restraint against alienation imposed by the laws of the United States.

S. Rep. No. 98-222, 98th Cong., 1st Sess. 14 (1983); H.Rep. No. 98-43, 98th Cong., 1st Sess. 9 (1983) (emphasis added). These statements describe the provision as disqualifying from trust status all tribal land other than settlement lands.

In addition, both the House and the Senate reports state that "[a]ny lands that may be acquired as part of an approved economic development plan that do not satisfy the definition of settlement lands set forth in subsection [1752(4)] are not to be taken in trust for the Tribe." S. Rep. No. 98-222, 98th Cong., 1st Sess. 14 (1983); H.R. Rep. No. 98-43, 98th Cong., 1st Sess. 9 (1983). The parties have not represented to the

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[16] Id.

court that the lands at issue have been acquired "as part of an approved economic development plan." Nevertheless, this passage constitutes a relevant indicator of legislative intent because it illuminates Congress' intention to prohibit the taking into trust of land outside the settlement lands purchased without Settlement Fund monies. It is reasonable to assume that Congress, unable to foresee the wealth the Tribe would eventually achieve through its casino operations and related enterprises, believed that the Tribe's economic activities would remain subject to such a plan.[17] It is therefore appropriate to infer from this passage a generalized intent that land outside the settlement lands would not be taken into trust for the Tribe.

The relationship between § 1754(b)(8) and other provisions of the statute bolsters the conclusion that plaintiffs' interpretation is correct and defendants' is incorrect. First, if § 1754(b)(8) has the meaning defendants ascribe to it, it is superfluous in light of § 1754(b)(5). Section 1754(b)(5) mandates that the United States shall have no trust responsibility for any property purchased with Settlement Fund money except for settlement lands so acquired. Thus, were § 1754(b)(8) interpreted as defendants urge--as meaning that the United States shall have no trust responsibility for any property purchased with Settlement Fund money and located outside of the settlement lands—it would add nothing beyond the command of § 1754(b)(5). In contrast, construed as a prohibition on the exercise of the Secretary's § 465 authority with respect to all land acquired by or for the Tribe outside the settlement lands, regardless of means of purchase, § 1754(b)(8) expresses a rule that has not already been clearly

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[17] The Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq., which permits Indian tribes to operate casinos, was enacted in 1988. The Tribe was authorized to conduct casino operations in 1991. 56 Fed. Reg. 24996 (1991).

articulated elsewhere in the statute. In general, courts assume that Congress intended the words it used to have meaning; statutory constructions that create redundancies are disfavored. *See, e.g., In re Mazzeo*, 131 F.3d 295, 302 (2d Cir. 1997); *Triestman v. United States*, 124 F.3d 361, 376 (2d Cir. 1997); *Carey v. New York Gaslight Club*, 598 F.2d 1253, 1257 n. 6 (2d Cir. 1979).

The propriety of plaintiffs' interpretation of the phrase "acquired under this subsection" in § 1754(b)(8) is further reinforced by reference to § 1754(b)(7), which contains precisely the same phrase. Given the identical wording of the phrase in each provision, and the juxtaposition of the two provisions, one must conclude that the phrase has the same meaning in each provision. If plaintiffs' interpretation of the phrase is adopted, § 1754(b)(7) constitutes a mandate that all land acquired by or for the Tribe within the boundaries of the settlement lands must be held in trust by the federal government, regardless of the means of acquisition. This construction gives effect to Congress' intention to create a reservation incorporating any and all settlement lands that could be acquired by or for the Tribe. *See* 25 U.S.C. § 1752(3), (4) and (7); S. Rep. 98-222, 98th Cong. 1st Sess. 14 (1983). In contrast, if defendants' interpretation of the phrase "acquired under this subsection" were adopted, § 1754(b)(7)'s requirement that settlement lands "shall be" taken into trust would extend only to lands acquired with Settlement Fund money, the Secretary would be free in the exercise of his § 465 discretion to refuse to take into trust settlement lands purchased with other money, and such land would be ineligible for reservation status.[18]

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[18] In addition, section 1754(b)(8), as interpreted by plaintiffs, in conjunction with sections 1754(b)(7) and 1757(a), helps to establish a sensible, comprehensive trust scheme. As described in the text, pursuant to § 1754(b)(7), land located within the settlement lands is to be taken into

Consideration of the purpose of the Act also supports plaintiffs' interpretation of § 1754(b)(8) as barring trust acquisition of any land located outside the settlement lands. All parties acknowledge that "[t]he purpose of [the legislation was] to provide Congressional ratification and implementation of a settlement of claims . . . raised by the Mashantucket Pequot Tribe" in its Nonintercourse Act lawsuit filed in 1976. S. Rep. No. 98-222, 98th Cong., 1st Sess. 5 (1983); *see also* 25 U.S.C. § 1751. However, each side's interpretation presupposes vastly different views of the nature of the settlement agreement.

Plaintiffs view the statute as providing a final, consensual settlement of a broad range of issues between the State and the Tribe, including competing claims of territorial sovereignty. Under this view of the statute, the Secretary may not expand the Tribe's territorial sovereignty beyond the boundaries of the settlement lands, as demarcated in the Settlement Act, over the objection of the State. In contrast, defendants view the statute as providing a final settlement only with regard to the Tribe's claims to aboriginal title. Under this

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trust for the Tribe, regardless of the source of the purchase money. The United States has a trust responsibility with regard to the original, State-recognized reservation—which has been incorporated into the new reservation, along with the settlement lands taken into trust, § 1752(7)—because that land, although technically held in fee, is subject to restrictions against alienation pursuant to § 1757(a) and the Nonintercourse Act, 25 U.S.C. § 177. *See* S. Rep. No. 98-222, 98th Cong., 1st Sess. 14 (1983) ("The present reservation of the Tribe, which is currently held in fee simple, will retain that status. Under section [1757(a)], however, the present reservation of the Tribe shall be subject to a federal restraint against alienation and, for this reason, the United States will have a trust responsibility to the present reservation.") Thus, all the land designated for reservation status by § 1752(b)(7) is to be taken into trust by the federal government, whereas, pursuant to § 1754(b)(8), land located outside the area designated for reservation status must be held in fee and may not be taken into trust.

view, the Act places no limits on the Secretary's authority to expand the scope of the Tribe's territorial sovereignty, at the expense of the sovereignty of the State and its municipal subdivisions, by taking land into trust under § 465.[19]

The court concludes that plaintiffs' view of the purpose of the Act is correct. The legislative record shows that settlements of Indian land claims typically address far more than the aboriginal claims alleged in the underlying lawsuit. According to a Senate staff memorandum incorporated into the record of the last hearing on the bill that became the Settlement Act, settlements of Indian land claims usually provide a broad final settlement encompassing issues of territorial sovereignty and jurisdiction:

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[19] Defendants maintain that the only limitation on the Secretary's discretion to take land into trust for the Tribe is the regulatory requirement that the Secretary's decision take account of the factors enumerated in 25 C.F.R. § 151.10. Those factors require the Secretary to consider "(a) The existence of statutory authority for the acquisition and any limitations contained in such authority; (b) The need of the . . . tribe for additional land; (c) The purposes for which the land will be used; . . . (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls; (f) Jurisdictional problems and potential conflicts of land use which may arise; and (g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status." Defendants have acknowledged that the rationale for the proposed trust acquisition—providing the Tribe with a stable land base protected by a federal restraint against alienation—would justify future trust acquisitions of other land. Asked at oral argument to specify the outer limit of the Secretary's authority to take more land into trust for the Tribe, defendants could state only that at some point, "[p]rior to the acquisition of all of southeastern Connecticut," it would "be unreasonable for the Secretary to find that he had rationally considered" the regulatory criteria. Transcript, November 24, 1997, at 70.

> In negotiating the Nonintercourse Act claims, the parties bargain for an arrangement with which they can live in the future. The Tribes typically negotiate for a land base and a settlement fund sufficient to promise a stable cultural and economic future. The State negotiates for an appropriate jurisdictional authority over the tribe and its land, the preservation of the property tax base, and so forth. The settlement in the end usually bears little relation to the positions set forth in the initial complaints and answers in the [underlying] case.

Staff Memorandum—The Veto of S.366. The Mashantucket Pequot Indian Claims Settlement Act, in Mashantucket Pequot Indian Land Claims: Hearing on S.1499 Before the Senate Comm. on Indian Affairs, 98th Cong., 1st Sess. 32 (1983).

The Settlement Act conformed to this typical pattern. The Act contains a complex, detailed definition of the scope of the Tribe's reservation, 25 U.S.C. §§ 1752(3), (4) and (7), and explicitly delineates the outer limits of the area in which the Tribe can expand its territorial sovereignty through purchases of land that can be taken into trust for the Tribe. *Id.* § 1752(3). The Act also defines a unique form of jurisdiction over the Tribe's reservation, declaring it to be "Indian country," but subjecting it "to State jurisdiction to the maximum extent provided by [25 U.S.C. § 1321 *et seq.*]." *Id.* § 1755. This intricate arrangement bespeaks a careful compromise regarding the nature and scope of the Tribe's territorial sovereignty.

It is unreasonable to suppose that the parties negotiated a settlement to include these arrangements and yet intended to allow the Secretary to take into trust for the benefit of the Tribe any and all land acquired by the Tribe in the future, as long as the land was not purchased with Settlement Fund money. Trust acquisitions of parcels located outside the settlement lands defined in the Act would undermine the ar-

rangement worked out by the Tribe and the State and approved by Congress. Such acquisitions would enable the Tribe to expand the geographical scope of its sovereignty beyond that contemplated by the Act.[20] Moreover, the Tribe would have greater autonomy with regard to those parcels than it has within the reservation defined by the statute. The statute's grant of "State jurisdiction [over the reservation] to the maximum extent provided in [25 U.S.C. § 1321 *et seq.*]," id. § 1755—which has been understood to confer upon the State full civil and criminal jurisdiction over the reservation, *Charles v. Charles*, 243 Conn. 255, 701 A.2d 650 (1997), *cert. denied*, 523 U.S. 1136, 118 S. Ct. 1838, 140 L. Ed. 2d 1089 (1998); *State v. Spears*, 234 Conn. 78, 662 A.2d 80, *cert. denied*, 516 U.S. 1009, 116 S. Ct. 565, 133 L. Ed. 2d 490 (1995)—would not apply in any areas taken into trust beyond the settlement lands[21]. Instead, the usual jurisdictional

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[20] If defendants' interpretation of § 1754(b)(8) were adopted, and the Secretary took the land at issue into trust, the amount of land under the jurisdiction of the Tribe would increase substantially, notwithstanding the limits the drafters of the Settlement Act placed on the geographic scope of the Tribe's sovereignty through § 1752. According to an internal Department of Interior memorandum, as of 1995, the settlement area consisted of 1228 acres held in trust, 255 acres held in fee by the Tribe, and 796 acres held in fee by non-Indians. Memorandum from the Acting Area Director of the BIA, Eastern Area, to the Acting Deputy Commissioner for Indian Affairs, dated January 27, 1995, in Administrative Record, I-W-5-6. Based on those figures, the pending trust acquisition of approximately 165 acres would place under the jurisdiction of the Tribe roughly eleven percent more land than it now controls within the settlement lands, and roughly seven percent more than the total potential acreage of the reservation.

[21] *See* memorandum accompanying notice of final agency determination, State's brief dated May 23, 1996, Appendix A, p. 10, designated by the Secretary as part of the Administrative Record ("The Settlement Act grants civil and criminal jurisdiction to the State of Connecticut. However, since these parcels are outside of the settlement area and being converted into trust under the authority of the IRA, we see no need to grant

consequences of trust status, which are more preclusive of state authority, would obtain. [22]

It is far more likely that the parties intended to negotiate an agreement that would preserve the significance of the jurisdictional arrangement that they had worked out with the assistance of the federal government. Accordingly, the court is persuaded that the statute was intended to embody such a settlement. Plaintiffs' interpretation of § 1754(b)(8) as barring trust acquisitions beyond the settlement lands, regardless of the source of the purchase money, gives effect to that purpose, further reinforcing the conclusion that plaintiffs' interpretation is correct.

The defendants contend that the interpretation of the Department of the Interior, as the agency charged with administration of the statute, deserves deference. *See Chevron,*

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jurisdiction to the state."); *see also* Administrative Record, I-AD-6. There seems to be no prospect that the lands might be designated as part of the reservation, and thereby come under the jurisdiction of the State pursuant to § 1755. The Department of the Interior has determined that the definition of the reservation in § 1752(7) supersedes the Secretary's general authority under 25 U.S.C. § 467 to confer reservation status upon newly acquired lands beyond the settlement lands. Memoranda from Roger Sumner Babb, Regional Solicitor, Southeast Region, to Bill D. Ott, Area Director, Eastern Area, BIA, dated May 30, 1990 and June 1, 1992, in Administrative Record, IX-C-D.

[22] As noted earlier, land taken into trust under § 465 is insulated from state and local control in at least three important respects: (1) trust lands are considered "Indian country," Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. at 511, 111 S.Ct. 905, and, accordingly are removed from state civil and criminal jurisdiction, unless the tribe consents to such jurisdiction, 25 U.S.C. §§ 1321, 1322; (2) trust lands are exempt from state and local taxation, 25 U.S.C. § 465; and (3) trust lands are exempt from state and local land use regulation, in the absence of a specific dispensation from the Secretary, which is to be based upon "the best interest of the Indian owner or owners." 25 C.F.R. § 1.4; *see also Santa Rosa Band of Indians*, 532 F.2d at 664-66 (9th Cir. 1975).

U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) ("if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute"). However, the deference normally accorded agency constructions of ambiguous statutory text is inappropriate in this case for several reasons.

First, "[i]n order for an agency interpretation to be granted deference, it must be consistent with the congressional purpose." *Morton v. Ruiz*, 415 U.S. 199, 237, 94 S. Ct. 1055, 39 L. Ed. 2d 270 (1974). "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. . . . If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." (Citations omitted.) Chevron, 467 U.S. at 843 n. 9, 104 S. Ct. 2778; *see also Lawrence County v. Lead-Deadwood Sch.* Dist. No. 40-1, 469 U.S. 256, 262, 105 S. Ct. 695, 83 L. Ed. 2d 635 (1985) ("[t]he interpretation of an agency charged with the administration of a statute is entitled to substantial deference . . . if it is not inconsistent with the legislative history"). In this case, although the statutory text is ambiguous, traditional tools of statutory construction nevertheless reveal Congress' intention, and defendants' interpretation is inconsistent with that intention.

Second, the agency gave two conflicting opinions regarding the meaning of § 1754(b)(8) within a two year period, originally adopting the position currently advocated by the plaintiffs, and then, after receiving a request for reconsideration from the Tribe, adopting the defendants' current interpre-

tation.[23] "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987) (internal quotation marks omitted); *see also Watt v. Alaska*, 451 U.S. 259, 273, 101 S. Ct. 1673, 68 L. Ed. 2d 80 (1981); *Morton v. Ruiz*, 415 U.S. at 237, 94 S. Ct. 1055.

Third, § 1754(b)(8) constitutes an explicit prohibition on certain agency action. When "courts [are] construing [provisions of] statutes enacted specifically to prohibit agency action," less deference to the interpretation of the agency is warranted. *Independent Ins. Agents of America, Inc. v. Board of Governors of Federal Reserve System*, 838 F.2d 627, 632 (2d Cir. 1988).

Defendants also claim that a decision in their favor is required by two canons of statutory construction. The first is the general rule that "when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as ef-

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[23] In December 1987, the Tribe formally requested the Department of the Interior to take into trust lands beyond the settlement lands that were purchased with non-Settlement Fund monies. In response to a request from the Area Director of the BIA, in January 1988, the Regional Solicitor of the BIA issued a formal opinion interpreting § 1754(b)(8) as plaintiffs now propose, commenting, "The contours of the Act are immediately apparent." Memorandum from BIA Regional Solicitor Roger Sumner Babb to BIA Area Director Bill D. Ott, Jan. 28, 1988, in Administrative Record, IX-A. After the Tribe expressed concern regarding the matter, the Area Director asked the Regional Solicitor to reconsider. The Regional Solicitor reversed his position. His second opinion, dated May 30, 1990, adopts the interpretation now urged by the defendants. See Administrative Record, IX-A-C; Plaintiff Towns and State of Connecticut's Joint Statement of Material Facts Not in Dispute [doc. # 70], p. 6; Defendants' Response [doc. # 99], pp. 4-5.

fective." *Morton v. Mancari*, 417 U.S. 535, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974). This rule applies when a proffered interpretation of a statute would place the statute in direct conflict with another statute, requiring the conclusion that one statute implicitly repealed the other. *See, e.g., id.* at 549-51, 94 S. Ct. 2474. Plaintiffs' interpretation of § 1754(b)(8) poses no such difficulty. A construction of the Settlement Act that prohibits the Secretary from taking into trust lands located outside the settlement lands does not require a conclusion that § 465 has been repealed. Rather, that interpretation merely carves out an exception to the general rule of § 465, in keeping with the principle of statutory interpretation that "[o]rdinarily, where a specific provision conflicts with a general one, the specific governs." *Edmond v. United States*, 520 U.S. 651, 657, 117 S. Ct. 1573, 137 L. Ed. 2d 917 (1997).

Second, defendants rely on the principle that "statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89, 39 S. Ct. 40, 63 L.Ed. 138 (1918); see also, e.g., *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985). Plaintiffs contend that this principle, which is premised on the need to protect "weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith," *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 174, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973), does not apply to disputes involving wealthy tribes, like the Mashantucket Pequots.[24] There is no need to resolve that

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[24] The administrative record hints at the economic power the Tribe has achieved through its successful gaming operations and associated enterprises. The Department of the Interior's internal memorandum recommending approval of the trust acquisition at issue in this case states:

question because this canon of construction, even when appropriately applied, will not defeat a construction based on a proper analysis of congressional intent. "In all case[s], the face of the Act, the surrounding circumstances, and the legislative history are to be examined with an eye toward determining what congressional intent was." (Internal quotation marks omitted.) *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587, 97 S. Ct. 1361, 51 L. Ed. 2d 660 (1977). Analysis based on those factors demonstrates that § 1754(b)(8) prohibits the Secretary from exercising his § 465 authority with respect to land outside the settlement lands.

In light of the foregoing, the interpretation of § 1754(b)(8) offered by the defendants cannot withstand scrutiny. The text of the statute, the structure of the statute as a whole, the purpose of the statute and the legislative history compel the conclusion that Congress intended § 1754(b)(8) to prohibit the Secretary from taking into trust for the benefit of the Tribe land located outside the settlement lands as defined in § 1752, regardless of the source of funds used to purchase the land. Because the land at issue is located outside the settle-

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The infra-structure and economic development projects taking place on the reservation have produced an annual construction payroll of approximately forty million dollars. The Foxwoods Casino employs approximately 9,500 people with an annual payroll in the vicinity of two hundred million dollars. Most of these employees live locally, including several hundreds in the towns of North Stonington and Ledyard. Each employee receives an excellent benefit plan, including full medical, dental, eye care, and pharmaceutical benefits. The current projects [generate] an incalculable 'spinoff' to local businesses generated by the tribe's economic development activities. . . . The tribe has not requested that their hotel (adjacent to the settlement area) be placed into trust. This results in the payment of $400,000 per year in property taxes to the Town of Ledyard. . . . Memorandum from the Director of the Office of Trust Responsibilities to Ada E. Deer, Assistant Secretary for Indian Affairs, May 1, 1995, in Administrative Record, I-AD-4-5.

ment lands, § 1754(b)(8) prohibits the Secretary from taking it into trust.

Accordingly, the Secretary's decision to take the land into trust is "unlawful," 5 U.S.C. §706(2), and must be set aside. *See id.*, § 706(2)(c) ("[t]he reviewing court shall (2) hold unlawful and set aside agency action, findings, and conclusions found to be ... in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"); *Citizens Committee for Hudson Valley v. Volpe*, 425 F.2d 97, 102 (2d Cir. 1970) ("[t]he district court has the power under 706 to set aside agency action in excess of statutory authority"). If the Tribe and the defendants wish to proceed with the proposed transfer of title to lands outside the settlement lands, they must seek congressional approval.

Plaintiffs' motions for summary judgment are granted. Defendants' summary judgment motion is denied. The court hereby declares that the Secretary's decision to take the parcels of land at issue into trust for the benefit of the Tribe violates the Settlement Act, 25 U.S.C. § 1754(b)(8), and the Secretary is hereby permanently enjoined from taking those parcels into trust.

APPENDIX C

STATUTES

SUBCHAPTER IV—CONNECTICUT INDIAN LAND CLAIMS SETTLEMENT

§ 1751. Congressional findings

The Congress finds that—

(a) there is pending before the United States District Court for the District of Connecticut a civil action entitled "Western Pequot Tribe of Indians against Holdridge Enterprises Incorporated, et al., Civil Action Numbered H86-193 (D. Conn.)," which involves Indian claims to certain public and private lands within the town of Ledyard, Connecticut;

(b) the pendency of this lawsuit has placed a cloud on the titles to much of the land in the town of Ledyard, including lands not involved in the lawsuit, which has resulted in severe economic hardships for the residents of the town;

(c) the congress shares with the State of Connecticut and the parties to the lawsuit a desire to remove all clouds on titles resulting from such Indian land claims;

(d) the parties to the lawsuit and others interested in the settlement of Indian land claims within the State of Connecticut have reached an agreement which requires implementing legislation by the Congress of the United States and the Legislature of the State of Connecticut;

(e) the Western Pequot Tribe, as represented as of October 18, 1983, by the Mashantucket Pequot Tribal Council, is the sole successor in interest to the aboriginal entity generally known as the Western Pequot Tribe which years ago claimed aboriginal title to certain lands in the State of Connecticut; and

(f) the State of Connecticut is contributing twenty acres of land owned by the State of Connecticut to fulfill this subshapter. The State of Connecticut will construe and repair three sections of paved or gravel roadways within the reservation of the Tribe. The State of Connecticut has provided special services to the members of the Western Pequot Tribe residing within its borders. The United States has provided few, if any, special services to the Western Pequot Tribe and has denied that it had jurisdiction over or responsibility for said Tribe. In view of the provision of land by the State of Connecticut, the provisions of paved roadways by the State of Connecticut, and the provision of special services by the State of Connecticut without being required to do so by Federal law, it is the intent of Congress that the State of Connecticut not be required to otherwise contribute directly to this claims settlement.

§ 1752. Definitions

For the purposes of this subchapter—

(1) The term " Tribe" means the Mashantucket Pequot Tribe (also known as the Western Pequot Tribe) as indentified by chapter 832 of the Connecticut General Statutes and all its predcessors and successors in interest. The Mashantucket Pequot Tribe is represented, as of October 18, 1983, by the Mashantucket Pequot tribal Council.

(2) The term "land or natural resources" mean any real property or natural resources, or any interest in or right involving any real property or natural resources including without limitation minerals and mineral rights, timber and timber rights, water and water rights, and hunting and fishing rights.

(3) The term "private settlement lands" mean—

(A) the eight hundred acres, more or less, of privately held land which are identified by a red outline on a map filed with the secretary of the state of Connecticut in accordance with the agreement referred to in section 1751(d) of this title, and

(B) the lands known as the Cedar Swamp which are adjacent to the Mashantucket Pequot Reservation as it exists on October 18, 1983. Within thirty days of October 18, 1983, the secretary of the States of Connecticut shall transmit to the Secretary a certified copy of said map.

(4) The term " settlement lands" means—

(A) the lands described in sections 2(a) and 3 of the Act To Implement the Settlement of the Mashantucked Pequot Indian Land Claims as enacted by the State of Connecticut and approved on June 9, 1982, and

(B) the private settlement lands.

(5) The term "Secretary" means the secretary of the Interior.

(6) The term "transfer" means any transaction involving, or any transaction the purpose of which was to effect, a change in title to or control of any land or natural resources, and any act, event, or cirumstance that resulted in a change in title to, possessin of, dominion over, or control of land or natural resources, including any sale, grant, lease, allotment, partition, or conveyance, whether pursuant to a treaty, compact or statute of a State or otherwise.

(7) The term "reservation" means the existing reservation of the Tribe as defined by Chapter 824 of the

Connecticut General Statutes and any settlement lands taken in trust by the United States for the Tribe.

§ 1753. Extinguishments of aboriginal titles and Indian claims

(a) Approval and ratification of prior transfer

Any transfer before October 18, 1983, from, by or on behalf of the Tribe or any of its members of land or natural resources located anywhere within the United States, and any transfer before October 18, 1983, from, by or on behalf of any Indian, Indian nation, or tribe or band of Indians of land or natural resources located anywhere with the town of Ledyard, Connectiuct, shall be deemed to have been made in accordance with the constitution and all laws of the United States, including without limitation the Trade and Intercourse Act of 1790, Act of July 22, 1790 (ch. 33 sec. 4, 1 Stat. 137, 138), and all amendments thereto and all subsequent reenactments and versions thereof, and Commandments thereto and all subsequent reenactments and versions thereof, and Congress hereby does approve and ratify any such transfer effective as of the date of said transfer.

(b) Extinguishment of title

By virtue of the approval and ratification of a transfer of land or natural resources effected by subsection (a), any aboriginal title held by the Tribe or any member of the Tribe, or any other Indian, Indian nation, or tribe or band of Indians, to any land or natural resources the transfer of which was approved and ratified by subsection (a) shall be regarded as extinguished as of the date of such transfer.

(c) Extinguishment of claims

By virtue of the approval and ratification of a transfer of land or natural resources effected by this section, or the extinguishement of aboriginal title effected thereby, any claim (including any claim for damages for trespass of for use

and occupancy) by or on behalf of, the Tribe or any member of the Tribe or by any other Indian, Indian nation, or tribe or band of Indians, against the United States, any State or subdivision thereof or any other person which is based on—

(1) any interest in or right involving any land or natural resources the transfer of which was approved and ratified by subsection (a) of this section, or

(2) any aboriginal title to land or natural resources the extinguishment of which was effected by subsection (b) of this section

shall be regarded as extinguished as of the date of any such transfer.

(d) Savings provision

Nothing in this section shall be construed to affect or eliminate the personal claim of any individual Indian (except for Federal common law fraud claim) which is pursued under any law of general applicability that protects non-Indians as well as Indians.

(e) Effective date; notice

(1) This section shall take effect upon the appropriation of $900,000 as authorized under section 1754(e) of this title.

(2) The secretary shall publish notice of such appropriation in Federal Register when the funds are deposited in the fund established under section 1754(a) of this title

§ 1754. Mashantucket Pequot Settlement Fund

(a) Establishment and administration

There is hereby established in Unithed States Treasury an account to be known as the Mashantucked Pequot Settlement Fund (hereinafter referred to in this section as the "Fund"). The Fund shall be held in trust by the Secretary for the benefit

of the Tribe and administered in accordance with this subchater.

(b) Expending of Fund; private settlement lands; economic development plan; acquisition of land and natural resources

(1) The Secretary is authorized and directed to expend, at the request of the Tribe, the Fund together with any and all income accruing to such Fund in accordance with this subsection.

(2) Not less than $600,000 of the Fund shall be available until January 1, 1985, for the acquisition by the Secretary of private settlement lands Subsequent to January 1, 1985, the Secretary shall determine whether and to what extent an amount less than $600,000 has been expended to acquire private settlement lands and shall make that amount available to the Tribe to be used in accordance with the economic development plan approved pursuant to paragraph (3).

(3)(A) The Secretary shall disburse all or part of the Fund together with any and all income accruing to such Fund (excepting the amount reserved in paragraph (2)) according to a plan to promote the economic development of the Tribe.

(B) The Tribe shall submit an economic development plan to the Secretary and the Secretary shall approve such plan within sixty days of its submission if he finds that it is reasonably related to the economic development of the Tribe. If the Secretary does not approve such plan, he shall, at the time of his decision, set forth in writing and with particularity, the reasons for his disapproval.

(C) The Secretary may not agree to terms which provide for the investment of the fund in a manner inconsistent with section 16a of this title unless the Tribe first submits a specific waiver of liability on the part of

the United States for any loss which may result from such an investment.

(D) The Tribe may, with the approval of the Secretary alter the economic development plan subject to the conditions set forth in subparagraph (B).

(4) Under no circumstances shall any part of the Fund be distributed to any member of the Tribe unless pursuant to the economic development plan approved by the Secretary under Paragraph (3).

(5) As the fund or any portion thereof is disbursed by the Secretary in accordance with this section, the United States shall have no further trust responsibility to the Tribe or its members with respect to the sums paid, any subsequent expenditures of these sums, or any property other than private settlement lands or services purchased with these sums.

(6) Until the Tribe has submitted and the Secretary has approved the terms of the use of the fund, the Secretary shall fix the terms for the administration of the portion of the Fund as to which there is no agreement.

(7) Lands or natural resources acquired under this subsection which are located within the settlement lands shall be held in trust by the United States for the benefit of the Tribe.

(8) Land or natural resources acquired under this subsection which are located outside of the settlement lands shall be held in fee by the Mashantucket Peqout tribe, and the United States shall have no further trust responsibility with respect to such land and natural resources. Such land and natural resources shall not be subject to any restriction against alienation under the laws of the United States.

(9) Notwithstanding the provisions of section 257 of Title 40 and section 258a of Title 40, the Secretary may acquire land or natural resources under this section from the ostensible owner of the land or natural resources only if the Secretary and the ostensible owner of the land or natural resources have agreed upon the identity of the land or natural resources to be sold and upon the purchase price and other terms of sale. Subject to the agreement required by the preceding sentence, the Secretary may institute condemnation proceedings in order to perfect title, satisfactory to the Attorney General, in the United States and condemn interests adverse to the ostensible owner.

(c) Transfer of private settlement land as involuntary conversion

For the purpose of subtitle A of the Internal Revenue Code of 1954, any transfer of private settlement land to which subsection (b) of this section applies shall be deemed to be an involuntary conversion within the meaning of section 1033 of such Code.

(d) Documentation of relinquishment of tribal claims

The Secretary may not expend on behalf of the Tribe any sums deposited in the Fund established pursuant to subsection (a) of this section unless and until he finds that authorized officials of the Tribe have executed appropriate documents relinquishing all Claims to the extent provided by sections 1753 and 1759 of this title, including stipulations to the final judicial dismissal with prejudice of its claims.

(e) Authorization of appropriation

There is authorized to be appropriated $900,000 to be deposited in the Fund.

§ 1755. State jurisdiction over reservation

Notwithstanding the provision relating to a special election in section 496 of the Act of April 11, 1968 (82 Stat. 80; 25 U.S.C. 1326), the reservation of the State jurisdiction to the maximum extent provided in title IV of such Act.

§ 1756. Practice and procedure

(a) Constitutionality

Notwithstanding any other provision of laws, the constitutionality of this subchapter may not be drawn into question in any action unless such question has been raised in—

(1) a pleading contained in a complaint filed before the end of the one-hundred-and-eighty-day period beginning on October 18, 1983, or

(2) an answer contained in a reply to a complaint before the end of such period.

(b) Jurisdiction

Notwithstanding any other provision of law, exclusive jurisdiction of any action in which the constitutionality of this subchapter is drawn into question is vested in the United States District Court for the District of Connecticut.

(c) Removal of actions

Any action to which subsection (a) of this section applies and which is brought in the court of any State may be removed by the defendant to the United States District Court for the District of Connecticut.

(d) Jurisdictional acts; implied consent to sue the United States

Except as provided in this subchapter, no provision of this subchapter shall be construed to constitute a jurisdictional act, to confer jurisdiction to sue, or to grant implied consent to an

Indian, Indian nation, or tribe or band of Indians to sue the United States of any of its officers with respect to the claims extinguished by the operation of this subchapter.

§ 1757. Restriction against alienation

(a) Subject to subsection (b) of this section, lands within the reservation which are held in trust by the Secretary for the benefit of the Tribe or which are subject to a Federal restraint against alienation at anytime after October 18, 1983, shall be subject to the laws of the United States relating to Indian lands, including section 177 of this title.

(b) Notwithstanding subsection (a) of this section, the Tribe may lease lands for any term of years to the Mashantucket Pequot Housing Authority, or any successor in interest to such Authority.

§ 1758. Extension of Federal recognition and privileges

(a) Applicability of United States laws and regulations

December 22, 2000Notwithstanding any other provision of law, Federal recognition is extended to the Tribe. Except ad otherwise provided in this subchapter, all laws and regulations of the United States of general application to Indians or Indian nations, tribes or bands of Indians which are not inconsistent with any specific provision of this subchapter shall be applicable to the Tribe.

(b) Filing of organic governing document and amendments

The Tribe shall file with the Secretary a copy of its organic governing document and any amendments thereto. Such instrument must be consistent with the terms of this subchapter and the Act to Implement the Settlement of the Mashantucket Pequot Indian Land Claim as enacted by the State of Connecticut and approved June 9, 1982.

(c) Eligibility for services and benefits

Notwithstanding any other provision of law, Tribe and members of the Tribe shall be eligible for all Federal services and benefits furnished to federally recognized Indian tribes as of October 18, 1983.

§ 1759. General discharge and release of State of Connecticut

Except as expressly provided herein, this subchapter shall constitute a general discharge and release of all obligations of the State of Connecticut and all of its political subdivisions, agencies, departments, and all of the officers of employees thereof arising from any treaty of agreement with, or on behalf of the Tribe or the United States as trustee therefore.

§ 1760. Separability

In the event that any provision of section 4 of this Title is held invalid, it is the intent of Congress that the entire subchapter be invalidated. In the event that any other section or provision of this subchapter is held invalid, it is the intent of Congress that the remaining sections of this subchapter shall continue in full force and effect.

Supreme Court, U.S.
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No. 00-1032

In the Supreme Court of the United States

STATE OF CONNECTICUT,
EX REL. RICHARD BLUMENTHAL,
ATTORNEY GENERAL OF CONNECTICUT, ET AL.,
PETITIONERS

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

In 1983, Congress enacted the Connecticut Indian Land Claims Settlement Act (Settlement Act), 25 U.S.C. 1751 *et seq.* The Settlement Act provided for federal recognition of the Mashantucket Pequot Indian Tribe (Tribe). In addition, in exchange for extinguishing the Tribe's claim of aboriginal title to hundreds of acres of land, the Act established a fund for the purchase of certain lands by the Tribe. The Act identified boundaries within which any lands acquired by the Tribe with those settlement funds would be held in trust by the Secretary of the Interior and become part of the Tribe's reservation. The question presented is as follows:

Whether the Settlement Act precludes the Secretary of the Interior from exercising her general authority pursuant to Section 5 of the Indian Reorganization Act, 25 U.S.C. 465, and regulations issued thereunder, to take lands into trust for the benefit of the Tribe with respect to lands that were not acquired by the Tribe with settlement funds and that lie outside the boundaries of the reservation established by the Settlement Act.

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In the Supreme Court of the United States

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UNITED STATES DEPARTMENT OF THE INTERIOR,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 228 F.3d 82. The opinion of the district court (Pet. App. 23a-47a) is reported at 26 F. Supp. 2d 397.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 2000. The petition for a writ of certiorari was filed on December 22, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Prior to 1983, the State of Connecticut recognized the Mashantucket Pequot Tribe (Tribe) as the sole successor to the aboriginal Western Pequot Tribe, which formerly occupied portions of western Connecticut. The Tribe had an existing, State-recognized reservation of approximately 200 acres near the Towns of Ledyard, Preston, and North Stonington, Connecticut. In 1976, the Tribe filed a federal lawsuit against certain private land owners, claiming that in 1855 Connecticut had transferred nearly 800 acres of the Tribe's land without congressional approval, in violation of the Trade and Intercourse Act, now codified at 25 U.S.C. 177. The lawsuit clouded title to hundreds of acres of land in Connecticut. The State intervened as a third-party defendant. The parties subsequently negotiated a settlement, which was later ratified by Congress in the Connecticut Indian Land Claims Settlement Act of 1983 (Settlement Act), 25 U.S.C. 1751 *et seq.* Pet. App. 5a.

The Settlement Act extinguished the Tribe's claim of aboriginal title to hundreds of acres of land. 25 U.S.C. 1753. In exchange, the Act provided for federal recognition of the Tribe, 25 U.S.C. 1758; established a settlement fund to enable the Tribe to acquire certain additional lands, 25 U.S.C. 1754; and identified boundaries within which any lands acquired by the Tribe with settlement funds would be held in trust by the Secretary of the Interior and become part of the Tribe's reservation, 25 U.S.C. 1752(3). The Act defined the Tribe's reservation to include the 200-acre reservation previously recognized by the State, as well as "any settlement lands taken in trust by the United States for the Tribe." 25 U.S.C. 1752(7). The Act defined the "settlement lands" to include certain lands provided by

the State to implement the settlement, as well as about 800 acres of "private settlement lands" that were identified on a map filed with the State. 25 U.S.C. 1752(3) and (4).

Section 1754 of the Act, entitled "Mashantucket Pequot Settlement Fund," created a $900,000 settlement fund. Under subsection (b) of that provision, entitled "Expenditure of Fund; private settlement lands; economic development plan; acquisition of land and natural resources," the bulk of that fund was made available immediately to acquire the "private settlement lands." 25 U.S.C. 1754(b)(2). Unexpended portions of the fund could be used to finance an "economic development plan," which could include the acquisition of property other than the private settlement lands. 25 U.S.C. 1754(b)(3). Subsection 1754(b) further provided that:

> (7) Lands or natural resources *acquired under this subsection* which are located within the settlement lands shall be held in trust by the United States for the benefit of the Tribe.
>
> (8) Land or natural resources *acquired under this subsection* which are located outside of the settlement lands shall be held in fee by the Mashantucket Pequot Tribe, and the United States shall have no further trust responsibility with respect to such land and natural resources. Such land and natural resources shall not be subject to any restriction against alienation under the laws of the United States.

25 U.S.C. 1754(b)(7) and (8) (emphasis added).

The Settlement Act states that "all laws and regulations of the United States of general application to Indians * * * which are not inconsistent with any

specific provision of this subchapter shall be applicable to the Tribe." 25 U.S.C. 1758(a).[1]

2. In January 1993, the Tribe asked the Secretary of the Interior to take certain lands into trust for the Tribe. The lands were located outside the reservation delineated by the Settlement Act and (except as discussed below) were acquired by the Tribe without the use of settlement funds.

Section 5 of the Indian Reorganization Act (IRA), 25 U.S.C. 465, grants the Secretary broad authority to take lands into trust on behalf of Indian Tribes and individual Indians. See Pet. App. 27a n.5 (quoting Section 5). The Secretary's determination whether to take lands into trust pursuant to Section 5 is limited by regulations issued by the Department of the Interior. 25 C.F.R. Pt. 151. Among other things, those regulations obligate the Secretary to consider: (1) the Indians' need for additional land; (2) the purposes for which the land will be used; (3) the impact on the State and its political subdivisions resulting from removal of the land from State tax rolls; and (4) the jurisdictional problems and potential conflicts that may arise from taking the land into trust. 25 C.F.R. 151.10. Off-reservation,

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[1] At the time the Settlement Act was enacted, "the Tribe was impoverished, with no obvious future source of revenue in sight." Pet. App. 3a. In 1990, the Tribe obtained approval to conduct Class III gaming activities on its reservation, pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701. The Tribe operates a casino on its reservation, which has proved to be economically successful, generating new wealth for the Tribe as well as economic opportunities for the surrounding non-tribal communities. Pet. App. 3a, 46a n.24. The Tribe pays approximately "$400,000 per year in property taxes to the Town of Ledyard" with respect to the operation of the casino, and it employs numerous non-Indian members of the community. *Ibid.*

noncontiguous lands may be taken into trust by the Secretary in keeping with those criteria, but only following notice to, and an opportunity to comment by, state and local governments. The regulations specifically contemplate an opportunity for judicial review of trust determinations. See 25 C.F.R. 151.12.[2]

The Tribe initially sought to transfer into trust six parcels of land owned by it in fee, totaling about 245 acres. The land is located outside the reservation area defined in the Settlement Act and within the Towns of Ledyard, North Stonington, and Preston. Most of that land is undeveloped, and the Tribe proposed to retain it as a "green buffer" around the reservation that was established by the Settlement Act. The only proposed alteration to the land was the paving of an existing 4.5 acre gravel parking lot. The Tribe subsequently withdrew its application with respect to an 82-acre tract of land that had been purchased with settlement funds. The revised application sought to have five lots, comprising about 165 acres, taken into trust by the Secretary. It is undisputed that none of that land was purchased with settlement funds.

In May 1995, the Secretary, after considering the regulatory criteria governing Section 5 determinations, granted the Tribe's application to take the land into trust. Pet. App. 2a.

3. Following the Secretary's action, petitioners filed this action pursuant to the Administrative Procedure

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[2] Land that is taken into trust by the Secretary ordinarily is considered to be "Indian country" within 18 U.S.C. 1151. In addition, Indian trust lands generally are exempted from state or local taxation, local zoning and regulatory requirements, and state criminal and civil jurisdiction over certain matters involving Indians on those lands. Pet. App. 4a.

Act, 5 U.S.C. 702, seeking to enjoin the Secretary from taking the land into trust on the ground, *inter alia*, that she was precluded from doing so under the terms of the Settlement Act.[3] The Secretary deferred taking the lands into trust pending the outcome of this litigation.

On cross-motions for summary judgment, the district court granted summary judgment for petitioners. Pet. App. 23a-47a. The court observed that, while "Congress has enacted numerous [Indian land claim] settlement acts," "[t]his appears to be the first case in which a state has opposed a trust acquisition by the Secretary on the ground that the acquisition is barred by a federal statute approving an Indian land claims settlement." *Id.* at 26a. On the merits, the court framed the parties' disagreement over the interpretation of the Settlement Act as follows:

> The parties' dispute centers on the meaning of the phrase "acquired under this subsection" in § 1754(b)(8). [Petitioners] suggest, in effect, that the phrase means "acquired by or for the Mashantucket Pequot Tribe." Thus construed, the phrase renders § 1754(b)(8) a prohibition against the Secretary's accepting into trust any land located outside the settlement lands. [Respondents] contend that § 1754(b) of the statute, the section in which subsection (8) appears, pertains to the use of the Settlement Fund and, accordingly, that the phrase

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[3] Petitioners also claimed, *inter alia*, that Section 5 of the IRA amounts to an unconstitutional delegation of legislative authority to the Executive Branch, and that the Secretary's decision to take the land at issue into trust violated the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, and the Coastal Zone Management Act of 1972, 16 U.S.C. 1451 *et seq.*, and was otherwise arbitrary and capricious. See Pet. App. 24a n.1.

> "acquired under this subsection" means "purchased with money from the Settlement Fund." Construed in this manner, the provision's acknowledged prohibition on the Secretary's § 465 authority is not triggered in this case because the land at issue was not purchased with Settlement Fund money.

Pet. App. 32a-33a.

The district court determined that Section 1754(b)(8) and, in particular, the phrase "acquired under this subsection" is ambiguous. Pet. App. 33a. The court then considered "other indicia of statutory meaning," beginning with the legislative history, and concluded that "[petitioners'] interpretation of the statute is correct." *Id.* at 34a. In so holding, the court declined to accord any deference to the Department of the Interior's interpretation of the Settlement Act, or to invoke the canon of construction that ambiguities contained within statutes passed for the benefit of Indians should be construed in favor of the Indians. *Id.* at 42a-46a. The court permanently enjoined the Secretary from taking the land into trust. *Id.* at 47a.

4. The court of appeals reversed. Pet. App. 1a-22a. The court held that the Settlement Act does not categorically preclude the Secretary from taking the lands at issue into trust and, in particular, that Section 1754(b)(8) "applies only to land purchased with settlement funds." *Id.* at 9a.

The court began with the language of the statute. "Reading § 1754 as a whole," the court found "that the phrase 'acquired under this subsection' in § (b)(8) is determinative of the statute's reach." Pet. App. 9a. The court explained that, given that Section 1754 is entitled "Mashantucket Pequot Settlement Fund," and that the heading of subsection (b) of that section refers

specifically to the "Expenditure of Fund," the reference in Section 1754(b)(8) to "'acquired under this subsection' is logically read to mean 'acquired with settlement funds.'" *Id.* at 9a-10a. Petitioners' contrary interpretation, the court reasoned, simply "renders the phrase 'acquired under this subsection' superfluous." *Id.* at 9a.[4]

The court explained its construction of Section 1754(b) as follows:

> [L]and acquired by the Tribe with settlement funds are either automatically taken into trust under § (b)(7) if they are within the boundaries of the settlement lands, or may not be taken into trust if outside those boundaries. The statute is silent with regard to lands, like the contested 165 acres here, not purchased with settlement funds. As to such lands, whether or not they are within settlement land boundaries, the Settlement Act does not apply. The Tribe may apply to the Secretary to take them into trust under the 1934 IRA, and the Secretary's decision will be governed by the considerations outlined in the relevant regulations. Nothing in § (b)(7) supplants the Secretary's power under the IRA to take into trust lands acquired without the use of settlement funds.

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[4] The court rejected petitioners' argument that this construction in turn rendered Section 1754(b)(5) superfluous, explaining that petitioners had "miscontrue[d] the meaning of [that provision]." Pet. App. 11a. "Section (b)(5) pertains to trust responsibilities over the settlement funds and provides for the automatic stripping of trust responsibilities '[a]s the fund . . . is disbursed.'" *Id.* at 11a-12a (quoting subsection (b)(5)). Subsection (b)(5), however, "is silent as to the status of lands purchased with settlement funds"; instead, the court explained, that issue is dealt with by subsections (b)(7) and (b)(8) of Section 1754. *Id.* at 12a.

Pet. App. 10a.

Although the court found "little, if any, ambiguity" (Pet. App. 12a) as to the meaning of Section 1754(b)(8), it nevertheless considered other evidence of Congress's intent. Considering the statute as a whole and its purpose, the court explained that nothing in the statute "indicates that Congress intended to establish the outermost boundaries of the Tribe's sovereign territory." *Id.* at 13a. By contrast, the Maine Indian Claims Settlement Act (Maine Settlement Act), 25 U.S.C. 1721 *et seq.*—upon which all agree the Mashantucket Pequot Settlement Act was modeled—broadly circumscribed the authority of the United States to acquire lands in trust for the affected tribes "[e]xcept for the provisions of this subchapter," and thus "supplant[ed] the Secretary's authority to take land into trust under the 1934 IRA beyond that expressly contemplated by the Maine Settlement Act." Pet. App. 14a (quoting Maine Settlement Act). "The absence of an analogous provision in the Settlement Act at issue in this case confirms that the Settlement Act was not meant to eliminate the Secretary's power under the IRA to take land purchased without settlement funds into trust for the benefit of the Tribe." *Ibid.*

The court also considered the legislative history of the Settlement Act, but concluded that it offered "only ambiguity, contradiction, and silence." Pet. App. 16a. At the same time, the court concluded that its interpretation was supported by the canon that statutes passed on behalf of Indians should be construed in favor of the Indians. *Id.* at 17a-18a. In the court's view, the relatively favorable economic situation enjoyed by the Tribe today "does not strip the Indian canon of its force," particularly since the Tribe was impoverished at the time the Settlement Act was enacted. *Id.* at 18a-

19a (citing *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753 (1985)). In addition, the court concluded that "the deference we generally owe to an agency's interpretation of an ambiguous statute supports our view of this appeal." *Id.* at 19a. As the court explained, even though a subordinate employee of the Department of the Interior had taken differing positions on the scope of the Settlement Act, the agency's views were still entitled to consideration, because the agency had "provided a reasoned analysis in support of its new determination that § (b)(8) refers only to land purchased with money from the settlement fund." *Id.* at 21a (citing *Rust* v. *Sullivan*, 500 U.S. 173, 186-187 (1991)).

Finally, the court observed that, to the extent that petitioners were objecting to the Secretary's exercise of her authority to take land into trust pursuant to the IRA "because the Mashantucket Pequots now have the purchasing power to make substantial real estate acquisitions," petitioners' arguments would be better addressed to Congress than to the courts. Pet. App. 22a. "Other federally recognized Indian tribes are not saddled with a geographical limit to the land that can be taken into trust by the Secretary." *Id.* at 21a. And, as the court put it, "we see no reason to fashion a rule [in this case] that limits the Tribe from seeking authorization, after administrative proceedings, to have land placed into trust with the Secretary simply because * * * [of] the Tribe's recent economic good fortune." *Id.* at 21a-22a.

5. The court of appeals remanded the case for further proceedings. Pet. App. 22a. On remand, petitioners will be permitted to press their arguments that Section 5 of the IRA is an impermissible delegation of legislative power, and that the Secretary's decision to

take the land at issue in this case into trust pursuant to Section 5 was arbitrary and capricious. See note 3, *supra*; Gov't C.A. Br. 38-39.

ARGUMENT

The court of appeals correctly and unanimously rejected petitioners' contentions that the Settlement Act precludes the Secretary from taking the lands at issue in this case into trust on behalf of the Tribe pursuant to her general authority under Section 5 of the IRA. The court's ruling does not conflict with any decision of this Court or any other court of appeals, and the interlocutory posture of this case strongly counsels against further review here.

1. Petitioners renew (Pet. 13-21) their argument that the Settlement Act prevents the Secretary from taking the lands at issue into trust pursuant to Section 5 of the IRA, even though the lands were not purchased with settlement funds. That contention was properly rejected by the court of appeals.

Given its plain meaning, the phrase "acquired under this subsection" in Section 1754(b)(8) of the Settlement Act limits the trust prohibition to lands acquired through the particular means identified in Section 1754(b)—*i.e.*, the expenditure of the settlement fund. See 25 U.S.C. 1754(b)(1) ("The Secretary is authorized and directed to expend, at the request of the Tribe, the Fund together with any and all income accruing to such Fund in accordance with this subsection."). As the court of appeals explained, that conclusion is supported by the headings used in Section 1754, the language of other provisions of Section 1754, and the statute as a whole. See Pet. App. 9a-11a. Petitioners' contrary construction all but renders the key phrase "acquired under this subsection" superfluous. *Id.* at 9a.

The design of Section 1754(b)(8) is clear. Section 1754 establishes a fund with which the Tribe could purchase "private settlement lands" that could be added to its reservation. 25 U.S.C. 1752(3). Congress anticipated that there might be a surplus in the fund after purchasing those lands, and it provided that remaining funds could be used to fund an "economic development plan," which could be used to acquire additional property. 25 U.S.C. 1754(b)(2). Section 1754(b)(8) directs that the Secretary shall not take any additional property so acquired—*i.e.*, under Section 1754(b), with settlement funds—into trust. Section 1754(b)(8) simply does not address the status of lands acquired with resources *other than* those provided by the settlement fund.

By contrast, the Maine Settlement Act, which the parties agree was the model for the Settlement Act under which this case arises (see Pet. App. 13a), does contain an express prohibition on the exercise of the Secretary's general Section 5 authority to take non-settlement lands into trust for the Indian Tribes covered by that Act. See 25 U.S.C. 1724(e). "[I]t is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Rodriguez* v. *United States*, 480 U.S. 522, 525 (1987) (citations omitted). And, as the court of appeals concluded, the disparate provisions of the Maine Settlement Act and the Mashantucket Pequot Settlement Act in this case furnish "strong" evidence that, in enacting the Mashantucket Pequot Settlement Act, Congress did not intend, *sub silentio*, to circumscribe the Secretary's Section 5 authority to take land into trust with respect to lands acquired by the Tribe without using settlement funds. Pet. App. 13a.

Petitioners' reliance (Pet. 14-15) on the Indian Land Consolidation Act (ILCA), 25 U.S.C. 2202 *et seq.*, is misplaced. The ILCA specifically provides that "nothing in this section is intended to supersede any other provision of Federal law which authorizes, prohibits, or restricts the acquisition of land for Indians with respect to any specific tribe, reservation, or state[s]." 25 U.S.C. 2202. In that regard, the ILCA operates in the same fashion as the savings clause of the Settlement Act at issue in this case, which provides that all federal Indian laws of general applicability are applicable to the Mashantucket Pequot Tribe, except as specifically provided by the Settlement Act. 25 U.S.C. 1758(a). Petitioners identify nothing in the ILCA that operates by itself to preclude the lands at issue in this case from being taken into trust by the Secretary under the IRA, or that specifically bears on the construction of Section 1754(b) of the Settlement Act. In any event, petitioners' reliance on the separate ILCA simply underscores that their interpretation lacks footing in the terms of the Settlement Act itself.[5]

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[5] Petitioners are correct (Pet. 14) that certain provisions of the IRA are inconsistent with certain other "specific provisions" of the Settlement Act—provisions not at issue here. For example, the Settlement Act precludes the Secretary from taking into trust pursuant to Section 5 of the IRA any lands outside the settlement lands if they are purchased with settlement funds. Similarly, the Department has concluded that it cannot add lands to the reservation, pursuant to Section 7 of the IRA, given the finite definition of the newly formed reservation in the Settlement Act. 25 U.S.C. 1752(7). Those specific provisions of the IRA are therefore displaced to the extent they are inconsistent with the Settlement Act. Since taking lands into trust does not automatically add lands to a reservation, however, petitioners are incorrect in asserting (Pet. 15) that, because the Secretary's authority under Section 7 of the

Petitioners' resort (Pet. 17-18) to legislative history is also unavailing. As the court of appeals explained, nothing in the legislative history compels a different conclusion from the one that follows from the statutory text. Pet. App. 15a-17a. Indeed, if anything, the legislative history simply confirms that Section 1754(b) "establishes the terms under which the settlement fund is to be administered," H.R. Rep. No. 43, 98th Cong., 1st Sess. 7 (1983), which is consistent with the court of appeals' conclusion that the key phrase—"acquired under this subsection"—in Section 1754(b)(8) means acquired with settlement funds. The other aspects of the legislative history relied upon by petitioners do not confirm their interpretation of the statute, but instead at most introduce "only ambiguity, contradiction, and silence." Pet. App. 16a.

The court of appeals' interpretation does not render Section 1754(b)(5) superfluous. See Pet. 16-17. Section 1754(b)(5) relieves the United States of its trust responsibility over settlement funds or property acquired with such funds as monies are disbursed from the settlement fund. Subsection (b)(5) does not address the distinct question of the legal status of lands that are *not* acquired with settlement funds. The purpose of subsection (b)(8), by contrast, is to establish the legal status of lands that *are* purchased with settlement funds but are located *outside* the statutorily-defined settlement lands. The legislative history makes clear that the two provisions have distinct purposes, explaining that subsection (b)(5) is addressed to the United States' responsibility with regard to specific funds that

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IRA is displaced, her authority under Section 5 of the IRA to take lands into trust is also displaced.

have been disbursed under the Settlement Act. Pet. App. 11a-12a.[6]

Petitioners point to a difference in language used in subsections (b)(7) and (b)(8) ("acquired under this subsection") and in subsection (b)(5) ("purchased with these sums"), and argue (Pet. 16) that Congress would not have used both phrases to mean acquired with settlement funds. The phrase "purchased with these sums," however, makes sense in the context of subsection (b)(5). As written in subsection (b)(5), "purchased with these sums" does not refer to the settlement fund, but rather to "sums paid" from the "Fund or any portion thereof [as] disbursed by the Secretary in accordance with this section [1754]." 25 U.S.C. 1754(b)(5). Because subsection (b)(5) is more specific regarding the Secretary's responsibility with respect to "portion[s] * * * disbursed" and "sums paid" from the settlement fund, it makes sense that Congress did not use the more general "acquired under this subsection" phrase found in subsections (b)(7) and (b)(8). Conversely, because subsections (b)(7) and (b)(8) are addressed primarily to the status of lands, and not the disbursement of settlement funds, it makes sense that Congress did not use the "sums paid" formulation employed in subsection (b)(5).

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[6] The committee reports explain:

> Section [1754](b)(5) provides that as portions of the settlement fund are disbursed to the proper tribal officials, the United States shall have no further responsibility for the use of those funds disbursed. The United States, of course, retains a responsibility for those monies that remain in the settlement fund.

S. Rep. No. 222, 98th Cong., 1st Sess. 14 (1983); H.R. Rep. No. 43, *supra*, at 8.

Finally, the court of appeals correctly rejected the contention that the Settlement Act was "a comprehensive statute intended to settle once-and-for-all the extent of the Mashantucket Pequot's sovereignty." Pet. App. 13a. The Settlement Act resolved specific aboriginal land claims in a specific suit, and was explicitly intended to "remove all clouds on titles resulting from such Indian land claims." 25 U.S.C. 1751(c). Petitioners err (Pet. 20-21) in attempting to broaden the enactment in an effort to prevent this Tribe from receiving the benefit of laws generally applicable to all other Indian Tribes. That there may be some uncertainty as to what lands may ultimately become Indian trust lands is true for all States in which Indian Tribes own (or may acquire) property that may be taken into trust pursuant to the IRA. The uncertainty is not unique to the Settlement Act at issue in this case, and is not a result of the court of appeals' interpretation of that Act.

2. Petitioners argue (Pet. 21-28) that the court of appeals improperly invoked the canon of construction that ambiguities contained within statutes or treaties passed for the benefit of Indians should be resolved in favor of Indians. That contention is without merit. This Court often invokes that canon in interpreting federal enactments pertaining to Indian Tribes and has recently observed that the canon is "deeply rooted in this Court's Indian jurisprudence." *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992).[7] In addition, as the

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[7] See, *e.g.*, *Hagen* v. *Utah*, 510 U.S. 399, 411 (1994); *Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 766 (1985); *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 247 (1985); see also *Three Affiliated Tribes of the Fort Berthold Reservation* v. *Wold Eng'g*,

court of appeals recognized, the Court has invoked the canon "where Indians were at no legal disadvantage." Pet. App. 18a-19a (discussing *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753, 758, 766 (1985)). Congress legislates against the backdrop of the settled Indian canon of construction.

In any event, the court of appeals' discussion of the Indian canon of construction does not warrant review. That is particularly true in light of the fact that that discussion was not necessary to the court's conclusion that the Settlement Act does not preclude the Secretary from taking into trust lands that are not purchased with settlement funds. The court based its holding first and foremost on its reading of the statutory provisions at issue, see Pet. App. 9a-12a; it simply added that, to the extent that there was any ambiguity in the statute, its interpretation found "additional support in the unique canon of construction governing statutory provisions involving Indians." *Id.* at 17a.

Petitioners contend that the Indian canon of construction is outdated, and suggest that "[c]larification of the rule is particularly important in the era following enactment of the Indian Gaming Regulatory Act [IGRA] when many tribes, like the Mashantucket Pequots, have attained great wealth and benefit through the assistance of non-Indian business interests." Pet. 28. The lower court case law does not support that conclusion. But, in any event, this case would be a poor vehicle in which to consider that argument in

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467 U.S. 138, 149 (1984); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973); *Choctaw Nation* v. *United States*, 318 U.S. 423, 431-433 (1943); *Alaska Pac. Fisheries* v. *United States*, 248 U.S. 78, 89 (1918); *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912).

light of the fact that the Settlement Act at issue was passed five years *before* IGRA. Similarly, while petitioners highlight the recent economic success enjoyed by the Tribe in this case, it is undisputed that, at the time of the enactment of the Mashantucket Pequot Settlement Act, "the Tribe was impoverished, with no obvious future source of revenue in sight." Pet. App. 3a. Thus, as the court of appeals explained below, even accepting petitioners' argument "that the Indian canon of construction applies with less force to statutes or treaties negotiated with a wealthy, powerful, and well-represented Indian tribe," that principle "has no application" with respect to the Settlement Act involved in this case. *Id.* at 19a.[8]

3. Petitioners argue (Pet. 28-29) that the court of appeals improperly took account of the Department of the Interior's interpretation of the Settlement Act. That argument also does not merit review. To begin with, just as was true with respect to the Indian canon of construction, the court's discussion of the agency's interpretation was not necessary to the court's holding that the Settlement Act does not prevent the Secretary from taking the lands at issue into trust; rather, the court simply added that, "[i]nsofar as agency deference

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[8] Petitioners imply that the Nation's Indian Tribes have been transformed by the passage of the IGRA into wealthy, co-equal participants in the legislative process. That is incorrect. The vast majority of the Nation's Indian Tribes continue to live at or below the poverty level. In addition, "[m]ore than two-thirds of Indian Tribes do not participate in Indian gambling at all." *Final Report of the National Gambling Impact Study Commission* 6-2 (July 18, 1999), drafted pursuant to the National Gambling Impact Study Commission Act, Pub. L. No. 104-169, 110 Stat. 1482. And for the majority of Indian Tribes that do have gambling facilities, "the revenues have been modest." *Id.* at 6-3.

remains appropriate in this case, it confirms our interpretation of the Settlement Act." Pet. App. 19a.

In any event, as this Court has repeatedly recognized, agencies are not forbidden from clarifying or changing their position on the interpretation of a statute with which they are charged with administering. As long as an agency provides a reasoned explanation for its change in position, its interpretation may still be afforded deference by a reviewing court. See *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996); *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 416 (1993). The court of appeals in this case concluded that "[t]he Department of the Interior has provided a reasoned analysis in support of its new determination that § 8(b) refers only to land purchased with money from the settlement fund," and that, "even according [that interpretation] less deference than usual," the court should still "take account of the agency's position." Pet. App. 21a. That conclusion is correct and does not merit further review.[9]

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[9] Moreover, the factual premise of petitioners' argument—*i.e.*, that the Department changed its position on the proper interpretation of the Settlement Act—is itself debatable. A regional solicitor of the Bureau of Indian Affairs initially concluded that lands located outside the settlement area must be held in fee and may not be held in trust, relying primarily on the legislative history of the Settlement Act. Following a more detailed analysis of the statute, however, that same official later reconsidered his view and determined that the lands at issue could be taken into trust. The regional solicitor was not authorized to bind the Department, and the agency itself has only adopted one position: that the Settlement Act does not prevent the Secretary from exercising her general authority pursuant to the IRA with respect to lands that are not acquired with settlement funds. Cf. *Wisconsin* v. *City of New York*, 517 U.S. 1, 23 (1996) ("[T]he mere fact that the Secretary's decision overruled the views of some of his subordinates is

4. Finally, review is not warranted to consider petitioners' broad-brush arguments that the sovereignty of Connecticut has been (or will be, with respect to hypothetical future trust applications by the Tribe) improperly diminished. The only question decided by the court of appeals is whether the Settlement Act categorically precludes the Secretary from exercising her general authority under Section 5 of the IRA to take lands into trust for the Tribe, even with respect to lands that were not acquired by the Tribe with settlement funds. To the extent that petitioners object to the scope of the Secretary's authority to take lands into trust for Indians pursuant to Section 5, or to the exercise of that authority in this case based on particular factors other than the Settlement Act, they may present those arguments on remand to the district court, and possibly still prevail in their effort to prevent the Secretary from taking the lands at issue into trust. See note 3, *supra*; Gov't C.A. Br. 38-39. In that regard, the interlocutory nature of this case in itself counsels strongly against granting certiorari. See *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.") (Scalia, J., respecting the denial of the petition for writ of certiorari).

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by itself of no moment in any judicial review of his decision."); see Gov't C.A. Br. 35-36.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

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STATE OF CONNECTICUT, *ex rel.* Richard Blumenthal, Attorney General; TOWN OF LEDYARD; TOWN OF NORTH STONINGTON; TOWN OF PRESTON,
Petitioners,

v.

THE UNITED STATES DEPARTMENT OF THE INTERIOR; GALE A. NORTON, Secretary of the Interior; JAMES H. MCDIVITT, Assistant Secretary of the Interior for Indian Affairs; FRANKLIN KEEL, Eastern Area Director, Bureau of Indian Affairs,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONERS

Petitioners State of Connecticut, *ex rel.* Richard Blumenthal, Attorney General and Towns of Ledyard, North Stonington, and Preston, Connecticut respectfully submit this reply to the brief in opposition to the petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Second Circuit in this case.

REPLY

1. The Secretary asserts that "acquired under this subsection," as used in the Connecticut Indian Land Claims

Settlement Act ("Settlement Act" or "Act"), 25 U.S.C. §§ 1751 *et seq.*, means acquired with Settlement Act funds and that any other interpretation renders the language superfluous. *See* Gov't Opp'n Br. at 12. The phrase "acquired under this subsection" has meaning, but not that claimed by the Secretary. If the phrase were omitted from the Settlement Act, the operable provisions would read that land within the settlement lands shall be held in trust and land located outside the settlement lands shall be held in fee by the Mashantucket Pequot Tribe ("Tribe") without regard to who owned the land. The congressional direction cannot work unless the land is first acquired by or on behalf of the Tribe. The subject phrase modifies the noun "land" to make clear that ownership or acquisition by the Tribe is a prerequisite to trust status. Thus, the phrase is not rendered superfluous if the Secretary's construction is rejected.

The Secretary argues, in effect, that the Settlement Act does little other than resolve a land claim and is not intended to constrain her authority in dealing with this Tribe beyond the disposition of the settlement fund created by Congress. *See* Gov't Opp'n Br. at 13-14. In support of that position, the Secretary would tie all provisions of the Act to the expenditure of the Settlement Fund. By this construction, the Act's constraints on the Secretary's authority expired when the Fund was exhausted over 15 years ago. This very narrow scope of interpretation has not been applied to other settlement acts, as evidenced by the language of the savings clause of the Indian Land Consolidation Act ("ILCA"), passed several months before the Settlement Act.

The Secretary, however, misconstrues petitioners' reliance on the ILCA. Since passage of the ILCA predates the Connecticut Act, the ILCA cannot explicitly reference the Settlement Act as it does several other earlier settlement acts, such as the Maine Indian Land Claims Settlement Act ("Maine Act"), 25 U.S.C. §§ 1721 *et seq.* The ILCA makes clear that Congress intended that specific Indian settlement

acts would not be superseded by the general trust acquisition authority of the Indian Reorganization Act ("IRA"), which the Secretary claims in this case. In effect, specific settlement acts are intended to supplant the general trust acquisition authority of the IRA for the Indian groups subject to such acts. Petitioners simply argue that the Settlement Act, although later passed, is one of the settlement acts, as referenced in the ILCA, that "authorizes, prohibits or restricts the acquisition of land for Indians with respect to any specific tribe, reservation or state." 25 U.S.C. § 2202. As such, the authorizations, prohibitions and restraints of the Settlement Act itself, not section 5 of the IRA, govern trust acquisitions for the Connecticut Tribe. This reading is consistent with both the ILCA and with the savings clause of the Settlement Act, which preserves only those other Indian laws that are not inconsistent with the Act. *See* 25 U.S.C. § 1758(a).

2. The Secretary relies heavily on the Maine Settlement Act as the model for and basis of interpretation of the Connecticut Act. *See* Gov't Opp'n Br. at 13. A brief explanation of the Maine Act demonstrates that this reliance is largely misplaced. Section 1724(d) of the Maine Act, is quite similar to section 1754(b) of the Settlement Act. The subsection is titled "apportionment of land acquisition fund," and delineates the sums appropriated for the three tribes covered by the act. *See* 25 U.S.C. § 1724(d). Subsection 1724(d) of the Maine Act states, in language parallel to 1754(b)(7) and (b)(8) of the Settlement Act, that, "the first 150,000 *acres* acquired for the Penobscot Nation *within the area* described in the Maine Implementing Act as eligible to be included within . . . the Penobscot Indian Territory *shall be held in trust by the United States*." 25 U.S.C. § 1724(d) (emphasis added). Section 1724(d) continues: "*Land* or natural resources acquired *outside the boundaries* of the aforesaid area[ ] *shall be held in fee* by the respective tribe or nation, and the United States shall have no further trust responsibility with respect thereto." *Id.* (emphasis added).

This language of the Maine Act, like the parallel language of the Settlement Act, covers all eventualities: land within the boundaries goes into trust; land outside the boundaries remains in fee. If the Maine Act is the model for the Settlement Act here, as the Secretary argues, it surely contains no indication or suggestion that the trust status of land in Maine depends upon the source of funds used to purchase the land. And, like the Settlement Act, the trust status of Indian land in Maine depends wholly on the location of the land as being within or outside the boundaries described in the act. If the Maine Act is the model for the Settlement Act, the Secretary's implied limitation based on the source of funds must be rejected.

Section 1754(b)(9) of the Settlement Act and section 1724(e) of the Maine Act contain verbatim language regarding the condemnation powers of the United States to take land on behalf of the tribes from landowners. *Compare* 25 U.S.C. § 1724(e) *with* 25 U.S.C § 1754(b)(9). Section 1724(e) of the Maine Act contains an additional sentence that is not found in the Settlement Act: "Except for the provisions of this subchapter, the United States shall have no other authority to acquire lands or natural resources in trust for the benefit of Indians or Indian nations, or tribes, or bands of Indians in the State of Maine." The Secretary acknowledges that this language supersedes her trust acquisition authority under section 5 of the IRA for Indians in Maine. *See* Gov't Opp'n Br. at 13. The Secretary argues, however, that the absence of this language in the Settlement Act shows an intent by Congress that her trust acquisition authority for the Tribe is unrestricted as long as the Tribe's land was not purchased with Settlement Act funds. *Id.* at 14-15 n.5.

This position is wrong for several reasons. The broad prohibition of section 1724(e) of the Maine Act was not intended to cover the three tribes identified in the authorizations and prohibitions of section 1724(d) of the act. The broad prohibition is unnecessary for and superfluous to

trust acquisitions for those three groups of Indians because the total trust authority of the Secretary for the benefit of those groups is comprehensively set forth in section 1724(d) of the Maine Act, in the same fashion as the trust authority for the Tribe is set forth in section 1754(b) of the Settlement Act. The broad prohibition included in the Maine Act assures that the Secretary has no trust acquisition authority for the benefit of any other Indians in the state, or as the prohibition reads, "for the benefit of Indians or Indian nations, or tribes, or bands of Indians in the State of Maine." 25 U.S.C. § 1754(e). The legislative history explicating this section of the Maine Act states: "The Secretary is limited in his ability to acquire land or natural resources for *any Indians or Indian tribes in Maine* to the authorities provided in this Act." S. Rep. No. 96-957, at 25 (1981) (emphasis added). Although the language of section 1724(d) referring to geographic boundaries of the enumerated tribes was sufficient to limit trust acquisitions for those groups of Indians, only the broad prohibition would cover other Indian groups in Maine.

A similar broad prohibition could not be used in Connecticut because the Settlement Act was not intended to limit the rights of any Indians other than the Mashantucket Pequot Tribe. As stated in the legislative history: "This finding [§ 1751(e)] is intended to make it clear that [the Act] in no way affects the interests, whatever they may be, of the Paucatuck Pequot Tribe (also known as the Eastern Pequot Tribe)." S. Rep. No. 98-222, at 10 (1983). It would have been inconsistent with this intent to add a general prohibition of the Secretary's section 5 authority, as in the Maine Act. But the absence of a general prohibition cannot reasonably be used to construe the limitation of section 1754(b) of the Settlement Act more narrowly than the parallel provisions of the Maine Act. To make clear that the Secretary's section 5 authority was suspended for the Tribe, Congress explained section 1754(d) by stating: "The Secretary's ability to acquire land for the Tribe *is limited to the authority provided by this*

Act." S. Rep. No. 98-222, at 14 (emphasis added). By contrast, the parallel explanation of section 1724(e) of the Maine Act, provides: "The Secretary is limited in his ability to acquire land or natural resources for any Indians or Indian Tribes in Maine to the authorities provided by this Act." S. Rep. No. 96-957, at 25. The Secretary's argument under the Maine Act is, at best wrong, and, at worst, disingenuous

3. The Secretary asserts that this case is a "poor vehicle" for the Court to reconsider the Indian canon of construction because it was unnecessary for the Second Circuit to rely on the canon, because the Indian Gaming Regulatory Act ("IGRA") was passed after the Settlement Act, and because the Tribe here had not achieved its considerable wealth from gaming at the time the Settlement Act was passed. *See* Gov't Opp'n Br. at 19-20. These arguments substantially mischaracterize the position of petitioners.

As discussed in the petition at 21-28, the Indian canon is a statutory construction tool devised to address the unequal bargaining power historically present in the negotiation of treaties between Indian tribes and the United States. Petitioners' argument is that the Indian canon should not *automatically* be used to ascertain congressional intent whenever the statute in question relates directly or tangentially to Indians.* Rather, resort to the canon should

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* In this regard, petitioners' argument bears strong resemblance to the position taken by the United States in *Chickasaw Nation v. United States*, No. 00-507, *cert. granted*, __ U.S. __ (Jan. 22, 2001), currently pending before this Court. Defending the lower court's nonapplication of the Indian canon in *Chickasaw Nation*, the United States states that "[l]ike other canons of statutory construction, the Indian canon should be used to resolve, rather than to create, doubt" and that "this Court's practice of using traditional tools of statutory construction to insure that it reaches a result consistent with congressional intent, *as opposed to reflexively resorting to the Indian canon of construction* in interpreting federal tax statutes to reach a result contrary to congressional intent." Brief for the United States, *Chickasaw Nation v. United States*, No. 00-507 (filed Dec.

depend upon a factual inquiry as to the circumstances that might warrant its use to mitigate unequal bargaining power. Petitioners do not contend that all Indians are wealthy or that the canon should not apply because the Tribe is now wealthy or engaged in gaming. While, in general, there may be less reason to resort to the Indian canon to divine congressional intent in contemporary acts of legislation or in circumstances were gaming interests are underwriting efforts to gain tribal recognition or trust annexation, neither the trial court nor the Second Circuit engaged in that sort of factual inquiry. Such an inquiry would most likely show that there was no inequality of bargaining power, and that the canon should not have been considered. Both courts, however, simply accepted the Secretary's argument that the Indian canon was appropriate to consider. The district court rejected its applicability, and the court of appeals reversed, finding that the canon required an interpretation that favored the Tribe. *See* Pet. at 17a-19a, 45a-46a.

Contrary to the government's assertion (Gov't Opp'n Br. at 18-19), the Second Circuit most assuredly relied on the Indian canon to reach its result. *See* Pet. at 17a-19a. While it did not declare that the Indian canon was the *sine qua non* of its holding, seldom, if ever, do courts state that a canon of construction is the sole or determinative basis of their holdings. Petitioners respectfully suggest that the canon is as relevant to the Second Circuit's holding here as it is in any case.

4. As with the Indian canon, the Secretary asserts that the Second Circuit's deference to the agency's interpretation of

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22, 2000) at 12, 13 (citation omitted, emphasis added). Petitioners here agree. While the canon can be a useful tool of interpretation when the predicates for its application are present, resort to a "reflexive" application of it in cases such as this one are contrary to this Court's practice and will lead to results that are inconsistent with congressional intent. *See* Pet. at 21-28.

the Settlement Act was not necessary (Gov't Opp'n Br. at 20-21), despite the fact that the court accepted the interpretation of the Act that is precisely the "new" interpretation offered by the agency to justify the very trust acquisition at issue in this litigation. *See* Pet. at 20a-22a. The Secretary would minimize the import of the agency's complete reversal of position by stating that the individual who reversed positions was a subordinate employee and that his reversal was accompanied by a "reasoned analysis." *See* Gov't Opp'n Br. at 21 (quoting Pet. at 21a). While it is true that everyone in the Department of the Interior is subordinate to the Secretary, regional solicitors are the principal legal officers charged with interpreting Indian statutes to guide agency actions. The regional solicitor at issue was not overruled by a superior; he reversed himself. The Secretary did not arrive at a different interpretation, but explicitly relied on the new interpretation by the regional solicitor in the written decision memorandum supporting the annexation decision in this case. Moreover, there was no reasoned analysis supporting the new interpretation. The "no" of the prior opinion simply became a "yes" in the new opinion, with citation to the same statutory language, but avoidance of the legislative history used to support the prior opinion. *See* Pet. at 43a-44a, n.23. If this administrative interpretation warrants deference, there is no interpretation that does not.

5. Finally, the Secretary urges the Court to deny review because petitioners' claims that her action improperly diminishes the sovereignty of the State and the jurisdiction of the Towns are either premature or hypothetical. *See* Gov't Opp'n Br. at 21-22. In May of 1995, the Secretary approved the trust acquisition at issue here over the well-documented objections of petitioners. The Tribe has made other applications to the Secretary to take additional land into trust, and expressed an intent to process yet more trust requests. The interpretation of the Settlement Act endorsed by the district court and urged here by petitioners would preclude all

of these trust acquisitions and prevent any further erosion of the sovereign reach of the State. The fact that some issues in this case are again before the district court does not make this petition for review premature or interlocutory in nature. The Second Circuit issued an opinion and final order on the dispositive issue in the case on which petitioners now seek review.

CONCLUSION

For the reasons stated, this Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

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